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### Soy and the City: The Protection of Indiana's Agricultural Land in Light of Biofuel Issues

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## SOY AND THE CITY: THE PROTECTION OF INDIANA'S AGRICULTURAL LAND IN LIGHT OF BIOFUEL ISSUES

### I. INTRODUCTION

Discussing the price of gasoline is almost as common as discussing the weather. Similar to the weather, the price of gasoline and a forecast of what it will cost in the future are broadcast daily on the news. Also like the weather, the price of gasoline affects everyone. Even those people who do not drive a car are affected by the rising cost of public transportation.<sup>1</sup> A weather forecaster's prediction of snow means a winter coat and mittens, but no protection exists when higher gas prices are predicted. Consumers have no option other than opening their wallets and paying the higher gas price.

Because gasoline is made from petroleum, a limited natural resource, those who control the natural resource control the price of gasoline. Nevertheless, hope exists that someday gas prices will become a worry of the past. The United States' search for energy independence yielded the discovery of corn and soybeans as a renewable natural resource.<sup>2</sup> By using homegrown crops, biofuels could liberate America from dependence on petroleum; Indiana, one of the leading producers of corn and soybeans, could become a leading producer of alternative fuels.<sup>3</sup>

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<sup>1</sup> In 1999, the American Public Transportation Association surveyed the effects of increased energy prices on public transportation, and found that increased fuel costs caused an increase in costs for those using public transportation and an increase in the cost of providing public transportation. Energy Price Increases and Public Transportation: Summary of an APTA Survey (Jan. 16, 2001), *available at* <http://www.apta.com/research/info/online/documents/fuelsurvey.pdf>.

<sup>2</sup> Although the search for alternate energy sources has recently focused on biofuels, using ethanol as a fuel is quite old. DAN LOOKER, ETHANOL IS TRENDY YET ANCIENT: BURNING GRAIN ALCOHOL FOR FUEL IS OLDER THAN YOU MIGHT THINK, <http://images.meredith.com/ag/pdf/ethanol-trendyancient.pdf> (last visited Oct. 28, 2007). In 1876, when Nikolaus Otto invented the first four-stroke internal combustion engine, it ran on an ethanol-gasoline blend. *Id.* As President George W. Bush urged, in his 2006 State of the Union Address, ethanol and biodiesel production and consumption should increase to reduce reliance on foreign sources of energy. George W. Bush, *State of the Union Address* (Jan. 31, 2006), *available at* <http://www.whitehouse.gov/stateoftheunion/2006/>.

<sup>3</sup> Rapid Farmland Loss in Indiana, <http://www.farmland.org/programs/states/in/default.asp> (last visited Jan. 9, 2008). American Farmland Trust, a nonprofit membership organization comprised of farmers and conservationists dedicated to protecting the United States' agricultural resources, reports that "Indiana ranks fourth for U.S. exports of

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Although biofuel's raw materials are renewable, the growth of corn and soybeans is also dependent on a natural resource: farmland. If farmland to grow corn and soybeans does not exist, then there will be no crops to create biofuel. Although Indiana's motto is "The Crossroads of America," most Indiana residents can hum the tune that accompanies the phrase "there is more than corn in Indiana!"<sup>4</sup> Farmland may currently dominate Indiana's landscape, but development of residential, industrial, and commercial areas are breaking up the continuity of Indiana's farmland—the problem of farmland loss to urbanization and industrialization is now more urgent.<sup>5</sup> A lasting protection must be placed on Hoosier farmland to protect this natural resource. Indiana stands in a position to play a key role in the country's biofuel production, but to do so it must retain its current farmland to grow the crops necessary to produce alternative energy.<sup>6</sup>

In this Note, Part II provides background of farmland preservation and biofuel production.<sup>7</sup> Part III of this Note analyzes current preservation programs and how the development and production of biofuels should play a part in creating a zoning standard in Indiana to preserve agricultural land.<sup>8</sup> Finally, in Part IV, this Note proposes the

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soybeans and products and sixth for feed grains and products." *Id.*; see also Final 200 Indiana Crop Production Summary (Jan. 12, 2006), available at <http://www.nass.usda.gov/in/pressrel/pr011205.txt>.

<sup>4</sup> Indiana State Library, <http://www.statelib.lib.in.us/www/ihb/emblems/index.html> (last visited Oct. 28, 2007). "More than corn in Indiana" is the long-running motto for Indiana Beach amusement park in Monticello, Indiana. Indiana Beach Amusement Resort, <http://www.indianabeach.com/> (last visited Oct. 28, 2007).

<sup>5</sup> Community and Economic Development—Quality of Life and the Environment, <http://www.nature.org/wherewework/northamerica/states/indiana/files/execsumm.pdf> (last visited Oct. 28, 2007). Land development in the United States increased by 34% from 1982 to 1997. *Id.* In the Midwest, the population grew 7.06% during the same time period, but the increase in urbanized land was 32.23%. *Id.*

<sup>6</sup> See *infra* Part II.C.2 (exploring how Indiana's location, current agricultural resources, and state government's goals place it in a primary position to be a biofuel production leader).

<sup>7</sup> See *infra* Part II.A (defining the different types of farmland as defined through the Federal Farmland Policy Act); Part II.B (exploring how the federal government, state government, and local governments have enacted legislation to conserve farmland); Part II.C (discussing ethanol and biofuel production and consumption in the United States and how Indiana fits into the national scheme); Part II.D (explaining the balance of creating a zoning standard without effectuating an unconstitutional taking).

<sup>8</sup> See *infra* Part III (evaluating the deficiencies of the FPPA and the FRPPA, analyzing the strengths and weaknesses of other states' conservation programs in comparison to Indiana's current agricultural land preservation programs, discussing how preserving agricultural land in Indiana through protective zoning benefits the state's goal of becoming more energy independent by making biofuel a more viable source of energy, and

creation of a new Indiana statute to protect farmland through agricultural zoning, in which the ability to produce biofuels is a factor.<sup>9</sup> Because of the inadequacy of current federal and Indiana legislation to protect farmland and its desire to lead in the biofuels field, Indiana must take the lead in preserving land through agricultural zoning.

## II. LEGAL BACKGROUND OF THE PROTECTION OF AGRICULTURAL LAND AND BIOFUELS

In order to understand how to protect agricultural land, the term "farmland"<sup>10</sup> must first be defined.<sup>11</sup> Once farmland is defined, in Part II.A, this Note, in Part II.B, will explore the methods used by the federal government and state governments to protect it,<sup>12</sup> review the legislation that the federal government has enacted in order to preserve farmland,<sup>13</sup> elaborate on how other states have effectuated agricultural preservation plans,<sup>14</sup> and focus on what steps Indiana has already taken to protect agriculturally zoned land.<sup>15</sup> Part II.C discusses the background of biofuels created by energy crops and the necessity of farmland to produce these fuels.<sup>16</sup> Finally, Part II.D surveys the restrictions for creating a constitutional zoning standard.<sup>17</sup>

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explaining how protecting farmlands through a new zoning standard would also encourage the production of biofuels).

<sup>9</sup> See *infra* Part IV (proposing the creation of new Indiana Code provisions which would lay out requisites for agricultural districts taking into consideration land that produces crops used to make biofuel).

<sup>10</sup> For purposes of this Note, "farmland," "agricultural land," and "cropland" will be used interchangeably.

<sup>11</sup> See *infra* Part II.A (discussing the different types of farmland as defined through the Federal Farmland Policy Act).

<sup>12</sup> See *infra* Part II.B (exploring how both the federal government, state government, and local governments have enacted legislation to conserve farmland).

<sup>13</sup> See *infra* Part II.B.1 (reviewing the history and current status of federal legislation to protect farmland).

<sup>14</sup> See *infra* Part II.B.2 (surveying how states, in conjunction with the federal legislation, protect their farmland).

<sup>15</sup> See *infra* Part II.B.3 (focusing on what steps Indiana has taken as compared to and in conjunction with the federal government and other state governments).

<sup>16</sup> See *infra* Part II.C (discussing ethanol and biofuel production and consumption in the United States and how Indiana fits into the national scheme).

<sup>17</sup> See *infra* Part II.D (explaining the balance of creating a zoning standard without effectuating an unconstitutional taking).

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A. *Farmland Defined*

The Farmland Protection Policy Act ("FPPA") classifies all farmland as either prime, unique, or of state or local importance.<sup>18</sup> As defined by the FPPA and the United States Department of Agriculture ("USDA"), prime farmland has the "best combination" of characteristics to produce crops with minimum effort.<sup>19</sup> The Secretary of Agriculture designates land used for specific high-value crops as "unique farmland."<sup>20</sup> However, the FPPA by state or local government can designate land outside these definitions.<sup>21</sup>

For the last twenty-five years, the United States Soil Conservation Service, now the National Resources Conservation Service ("NRCS") has used a land evaluation and site assessment system to rate land's potential for agriculture.<sup>22</sup> Although the Federal government

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<sup>18</sup> Farmland Protection Policy, 7 U.S.C. § 4201(c) (2000). Farmland of state or local importance is categorized under other farmland and is designated by state or local government because of production of food, feed, fiber, forage, or oilseed crops. 7 U.S.C. § 4201(c)(1)(C) (2000).

<sup>19</sup> Farmland Protection Policy, 7 U.S.C. § 4201(c)(1)(A) (2000), defines prime farmland as: land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, and without intolerable soil erosion, as determined by the Secretary. Prime farmland includes land that possesses the above characteristics but is being used currently to produce livestock and timber. It does not include land already in or committed to urban development or water storage[.]

*Id.*

<sup>20</sup> Farmland Protection Policy, 7 U.S.C. § 4201(c)(1)(B) (2000), defines unique farmland as:

land other than prime farmland that is used for production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables[.]

*Id.*

<sup>21</sup> Farmland Protection Policy, 7 U.S.C. § 4201(c)(1)(C) (2000), defines other farmland as: [F]armland, other than prime or unique farmland, that is of statewide or local importance for the production of food, feed, fiber, forage, or oilseed crops, as determined by the appropriate State or unit of local government agency or agencies, and that the Secretary determines should be considered as farmland for the purposes of this chapter[.]

*Id.*

<sup>22</sup> Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 302 (2004). The NRCS's land evaluation is based on data from the National Cooperative Soil Survey and takes into account non-soil factors

implemented this program for purposes of the FPPA, some state and local governments have also adopted this assessment system for their own needs.<sup>23</sup> Soil designations recognize the differing qualities of land so that land particularly useful for agricultural purposes receives higher priority for protection.<sup>24</sup> Productive agricultural land is a "finite and irreplaceable natural resource."<sup>25</sup>

Historically, the United States' economy was primarily agricultural.<sup>26</sup> Although the nature of the economy has shifted, grassland pasture and range, forest, and cropland continue to be the predominant uses of land in the forty-eight contiguous states.<sup>27</sup> Despite cropland's continued predominance, the amount of farmland in the country has decreased.<sup>28</sup> The American Farmland Trust estimates that every year approximately 1.2 million acres of United States farmland are converted for non-agricultural uses.<sup>29</sup> Particularly vulnerable to conversion are low-density

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related to agricultural use, factors related to development pressures, and other public values of a site. Natural Resources Conservation Service, <http://www.nrcs.usda.gov/programs/lesa/> (last visited on Oct. 28, 2007).

<sup>23</sup> Paster, *supra* note 22, at 302. To help local or state officials make rational, consistent, and sound land use decisions, the NRCS's system includes values and objectives developed locally. However, the land evaluation system can and should be developed at the governmental level for which it will be used. Natural Resources Conservation Service, [http://www.nrcs.usda.gov/programs/lesa/lesa\\_sysdes\\_uses.html](http://www.nrcs.usda.gov/programs/lesa/lesa_sysdes_uses.html) (last visited Oct. 28, 2007).

<sup>24</sup> Natural Resources Conservation Service, *Prime Farmland Soils*, <http://www.ca.nrcs.usda.gov/mlra02/napa/primfarmtbl.html> (last visited Oct. 28, 2007). "The loss of prime farmland to other uses puts pressure on marginal lands, which generally are more erodible, droughty, and less productive and cannot be easily cultivated." *Id.*

<sup>25</sup> *Fact Sheet: Why Save Farmland?*, American Farmland Trust, at 1 (Jan. 2003), available at [http://www.farmland.org/documents/28562/Why\\_Save\\_Farmland\\_1-03.pdf](http://www.farmland.org/documents/28562/Why_Save_Farmland_1-03.pdf). No one has been able to manufacture fertile soil; it takes "thousands of years to develop" as well as "climate, geology, biology and good luck." *Id.*

<sup>26</sup> Tadlock Cowan, *The Changing Structure of Agriculture and Rural America: Emerging Opportunities and Challenges*, CRS Report for Congress, at 6 (Oct. 30, 2001). The country's first census, in 1790, showed that it was primarily an economy based on agriculture. *Id.* By 1880, only about half of the population was still farming, and by 1920 only one-third of the total population continued to farm. *Id.*

<sup>27</sup> *Id.* As of 2000, in the U.S., 578 million acres were grassland pasture and range, 553 million acres were forest, and 455 million acres were cropland. *Id.* The cropland estimate includes land that is currently used for crops, cropland idled for conservation purposes, and cropland used for pasture. *Id.*

<sup>28</sup> *Id.* Between 1945 and 1997, the total amount of cropland decreased by 8%. *Id.*

<sup>29</sup> American Farmland Trust, <http://www.farmland.org/programs/default.asp> (last visited Oct. 28, 2006). For twenty-five years, American Farmland Trust has been committed to protecting the nation's best farm and ranch land and improving the economic viability of agriculture by working with federal, state, and local leaders to develop legislation and implement programs. *Id.* The American Farmland Trust is a nonprofit organization founded in 1980 by a group of farmers and conservationists concerned by the rapid loss of

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farming operations lying on the edge of the urban fringe, because increasing land values tempt these fringe farmers to sell their land.<sup>30</sup> This trend represents one reason why only a small number of farming-dependent counties still exist.<sup>31</sup> However, farmland is valuable not only for the food and fiber that it provides, but also for non-market purposes.<sup>32</sup>

Indiana plays an important part in America's agricultural economy.<sup>33</sup> As part of America's "Corn Belt," Indiana's most-produced commodity is corn for grain.<sup>34</sup> Although Indiana's most-produced commodity is corn, the state's farmers harvest almost as many acres of soybeans.<sup>35</sup> Currently, Indiana contains approximately fifteen million acres of farmland where corn and soybeans can be grown.<sup>36</sup> However, Indiana's ability to maintain production may be threatened if agricultural land loss continues, because the amount of available acreage

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the nation's farmland to development and dedicated to protecting agricultural resources. American Farmland Trust: About Us, <http://www.farmland.org/about/default.asp> (last visited Oct. 28, 2007).

<sup>30</sup> Cowan, *supra* note 26, at 18; Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 79 (1998). Besides its lower cost, farmland is also attractive because it is flat, well-drained, vacant, and often already has a system of roads. *Id.*; see also Paster, *supra* note 22, at 315 (stating that since World War II, the greatest proportion of growth has occurred at the urban fringes, resulting in the loss of agricultural land).

<sup>31</sup> Cowan, *supra* note 26, at 27. In 1997, only 316 farming-dependent counties, counties in which twenty percent of total labor and income were derived from farming, were still in existence. *Id.* The decline on agricultural dependence correlates with the increase in sales per farm, because farms have become fewer and larger. *Id.*

<sup>32</sup> *Farmland Protection: The Role of Public Preferences for Rural Amenities/AER-815*, Economic Research Service/USDA, 41 [hereinafter "Public Preference"]. Rural amenities may not draw a profit, but farmland is also profitable by providing agrarian cultural heritage, open space, scenic beauty or rural landscapes, wildlife habitat, and environmental quality. *Id.*

<sup>33</sup> American Farmland Trust, *Rapid Farmland Loss in Indiana*, <http://www.farmland.org/programs/states/in/default.asp> (last visited Nov. 12, 2006). Indiana is the fourth largest U.S. exporter of soybeans and soybean products and the sixth largest for feed grains and feed grain products. *Id.*

<sup>34</sup> Indiana State Agricultural Overview—2005, National Agricultural Statistics Service, [http://www.nass.usda.gov/Statistics\\_by\\_State/Ag\\_Overview/AgOverview\\_IN.pdf](http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_IN.pdf) (last visited Oct. 9, 2006). In 2005, Indiana harvested 5,770,000 acres of corn. Indiana also produces soybeans, hay, wheat, peppermint, spearmint, oats, and alfalfa. *Id.*

<sup>35</sup> *Id.* Although Indiana harvested 5,380,000 acres of soybeans as compared to 5,770,000 acres of corn in 2005, over three times as many bushels of corn were produced from those acres. *Id.*

<sup>36</sup> *Id.*

for agricultural use in Indiana has decreased by approximately six million acres in the last one hundred years.<sup>37</sup>

*B. Federal and Statewide Agricultural Preservation Plans*

The methods used by the federal and state governments to protect farmland vary.<sup>38</sup> Section II.B.1 surveys the legislation that the federal government has enacted in order to preserve farmland.<sup>39</sup> Next, Section II.B.2 elaborates on how individual states have effectuated agricultural preservation plans.<sup>40</sup> Finally, Section II.B.3 focuses on what steps Indiana has already taken to protect agriculturally zoned land.<sup>41</sup>

1. Federal Legislation

Agriculture remains the primary policy framework for Congress' consideration of rural issues.<sup>42</sup> Despite the country's long agrarian history, the federal government has only recently addressed the loss of farmland.<sup>43</sup> Congress initially rejected legislation due to the belief that farmland protection should be a state or local matter.<sup>44</sup> Before any formal policy was enacted, all federal department heads were urged by

<sup>37</sup> Indiana Farm Land Use History, National Agricultural Statistics Service, [http://www.nass.usda.gov/Statistics\\_by\\_State/Indiana/Historical\\_Data/Land\\_Use/h97s\\_tnam.pdf](http://www.nass.usda.gov/Statistics_by_State/Indiana/Historical_Data/Land_Use/h97s_tnam.pdf) (last visited Oct. 28, 2007). Although the available acreage amount has dropped significantly, the amount of acreage harvested annually has remained fairly consistent. *Id.* Each year more than 100,000 acres, an area equal to half of Brown County, Indiana, of Indiana farmland is converted to non-farm uses. *Id.* Indiana is number seven on the list of states losing the most farmland in the 1997-2002 period. Rapid Farmland Loss in Indiana, <http://www.farmland.org/programs/states/Indiana.asp> (last visited Oct. 28, 2007).

<sup>38</sup> See *infra* Part II.B (surveying what steps have currently been taken by both federal and state governments, with a focus on Indiana's preservation scheme).

<sup>39</sup> See *infra* Part II.B.1 (reviewing the history of the federal government's protection of farmland and also explaining the federal legislation that currently is in place).

<sup>40</sup> See *infra* Part II.B.2 (reviewing what types of agricultural conservation plans other states have taken, focusing on the Corn Belt states because of their agricultural similarity to Indiana).

<sup>41</sup> See *infra* Part II.B.3 (focusing on Indiana's legislation protecting farmland).

<sup>42</sup> Cowan, *supra* note 26, at 2. The dominant themes for federal policy over the last 200 years have been: "(1) land distribution and management. (2) human resources and physical infrastructure development, (3) financial support for farmers and ranchers, and (4) poverty alleviation." *Id.*

<sup>43</sup> Michael R. Eitel, *The Farm and Ranch Lands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss*, 8 DRAKE J. AGRIC. L. 591, 597 (2003). The federal government's first efforts were in 1934 when the Natural Resources Board proposed a national system for developing county farm lands, but these efforts did not produce any material results. *Id.*

<sup>44</sup> *Id.* Washington Senator Henry Jackson introduced the Land Use Policy and Planning Assistance Act in 1972 and 1973, which was intended to "encourage systematic attention to development patterns and to bring some consistency to state efforts." *Id.*



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the President's Council on Environmental Quality ("President's Council") to analyze how their agencies would affect farmland.<sup>45</sup> In furtherance of this idea, the USDA also resolved to intercede when a federal agency planned to build on prime farmland.<sup>46</sup> In 1979, the USDA and the President's Council joined forces to conduct an eighteen-month assessment of the extent of farmland loss in the United States, the results of which finally led to legislative efforts to reduce loss at the federal level.<sup>47</sup>

Congress responded to the results of the assessment with the Farmland Protection Policy Act of 1981 ("FPPA").<sup>48</sup> The Congressional findings recognized that farmland is a unique natural resource necessary for the United States' general welfare.<sup>49</sup> The FPPA requires federal

<sup>45</sup> Sam Sheronick, Note, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583, 585-86 (1991) (citing USDA, Secretary's Memorandum No. 1827, Supplement 1, Washington, D.C. (June 21, 1976), which states "[The] USDA will urge all agencies to adopt the policy that federal activities that take prime agricultural land should be initiated only when there are no suitable alternative sites and when the action is in response to an overriding public need.").

<sup>46</sup> Sheronick, *supra* note 45, at 586 (citing USDA, Secretary's Memorandum No. 1827, revised, Washington, D.C. (Oct. 30, 1978), which stated that the USDA preferred preserving farmland, "whenever proposed conversions are: (1) caused or encouraged by actions or programs of a federal agency; (2) licensed by or require approval by a federal agency; or (3) inconsistent with local or state government plans.").

<sup>47</sup> Sheronick, *supra* note 45, at 586. This assessment was called the National Agricultural Lands Study. *Id.* See generally, William A. Fischel, *The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study*, 58 LAND ECONOMICS 236 (May 1982).

<sup>48</sup> Farmland Protection Policy Act of 1981, 7 U.S.C. §§ 4201-4209 (1982).

<sup>49</sup> 7 U.S.C. § 4201(a)(1) (2000). A list of the Congressional findings are as follows:

- (a) Congressional statement of findings. Congress finds that—
  - (1) the Nation's farmland is a unique natural resource and provides food and fiber necessary for the continued welfare of the people of the United States;
  - (2) each year, a large amount of the Nation's farmland is irrevocably converted from actual or potential agricultural use to nonagricultural use;
  - (3) continued decrease in the Nation's farmland base may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets;
  - (4) the extensive use of farmland for nonagricultural purposes undermines the economic base of many rural areas;
  - (5) Federal actions, in many cases, result in the conversion of farmland to nonagricultural uses where alternative actions would be preferred;
  - (6) the Department of Agriculture is the agency primarily responsible for the implementation of Federal policy with respect to United States farmland, assuring the maintenance of the agricultural production capacity of the United States, and has the personnel and

agencies to examine impacts and alternatives for any action that would result in the conversion of farmland, but it does not require an agency to withhold funding for a project that will result in the conversion of farmland.<sup>50</sup> While the FPPA began the federal government's involvement in farmland preservation, it did not effectively produce substantive results because it only mandated agency process.<sup>51</sup>

In furtherance of the federal government's preservation goals, Congress created the Agricultural Resource Conservation Demonstration Program in 1990, which authorized the federal government to provide guaranteed loans and subsidized interest payments to state and local protection programs.<sup>52</sup> Demonstrating the government's continued dedication to conserving cropland, in 1996, Congress enacted the Federal Agriculture Improvement and Reform Act ("FAIR act"), which superseded the 1990 program.<sup>53</sup>

The current program enacted in the FAIR Act is the Farm and Ranch Lands Protection Program ("FRPP").<sup>54</sup> Reauthorized in 2002, the FRPP's

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other resources needed to implement national farmland protection policy; and

(7) The Department of Agriculture and other Federal agencies should take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses in cases in which other national interests do not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources.

7 U.S.C. § 4201(a) (2000).

<sup>50</sup> 7 U.S.C. § 4201(a)(7). The language of the FPPA is clearly only permissive: The Department of Agriculture and other Federal agencies *should* take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses *in cases* in which other national interests do not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources.

*Id.* (emphasis added).

<sup>51</sup> Eitel, *supra* note 43, at 598 (evaluating the strengths and weaknesses of federal preservation legislation).

<sup>52</sup> Farms for the Future Act of 1990, 42 U.S.C. § 4201 (1990). The Farms for the Future Act of 1990 was superseded by the Farmland Protection Program. 61 Fed. Reg. 43,226 (Aug. 21, 1996).

<sup>53</sup> See Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. §§ 7201-7218 (2000). See also Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996). Congress' goal was to purchase conservation easements or other interests in between 170,000 and 340,000 acres of prime, unique, and other productive agricultural land during the fiscal years 1996 through 2002. *Id.*

<sup>54</sup> Farm and Ranch Lands Protection Program, 16 U.S.C. § 3830 (2000), as amended by the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

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purposes are to help farmers and ranchers keep their land and to reduce agricultural land conversion.<sup>55</sup> The FRPP contains provisions on how the program will operate, what land is eligible, what entities are eligible, and how the federal government will determine who will receive funding.<sup>56</sup> The NRCS established and administers the program and also develops the final rules for the FRPP.<sup>57</sup> Under the FRPP, agricultural land owners voluntarily enter into formal agreements with the NRCS, in which the land owners agree to keep their land in agricultural production in exchange for compensation.<sup>58</sup> Once the land owner and the NRCS enter into the agreement, the NRCS partially funds the purchase of conservation easements or other interests in the land.<sup>59</sup> Although the federal government is able to ward off conversion of some farmland through the FRPP, not all landowners who apply for FRPP assistance from the NRCS are accepted into the program.<sup>60</sup> The authorization for the FRPP expired in September 2007 and proposals for amended versions include expanding the purpose to protect topsoil to retain the

<sup>55</sup> See 16 U.S.C. § 3838; see also H.R. CONF. REP. NO. 107-424, at 502 (2002). Congress' intent in re-authorizing the FRPP in 2002 was to continue to protect farmland, but also to expand the purpose of the program to grazing, pasture, range, and forestland that is included in an agricultural operation and the eligibility to Indian tribes and qualified non-profit organizations. Jeffrey Zinn & Tadlock Cowan, *Agriculture Conservation Programs: A Scorecard*, CRS Report for Congress, at 12 (April 10, 2006).

<sup>56</sup> Eitel, *supra* note 43, at 599. The NRCS released an interim final rule for the program in the July 27, 2006 edition of the Federal Register, clarifying and formalizing the requirements that the agency has implemented in the last ten years of the FRPP's existence, such as the definition of fair market value, eligibility of forest lands, real property interest of the U.S., title review, exercising the U.S.'s rights, appraisal, impervious surface limitations, and indemnification. *Changes to the Federal Farm and Ranch Land Protection Program*, [http://www.farmland.org/programs/federa/Federal\\_Updated/08222006FRPP.asp](http://www.farmland.org/programs/federa/Federal_Updated/08222006FRPP.asp) (last visited Oct. 9, 2006).

<sup>57</sup> Eitel, *supra* note 43, at 599-600; see also Natural Resources Conservation Service, [http://www.nrcs.usda.gov/programs/farmbill/2002/pubntcs/frpp\\_final.html](http://www.nrcs.usda.gov/programs/farmbill/2002/pubntcs/frpp_final.html) (last visited Oct. 28, 2007) (setting forth the policies implemented by the NRCS under the FRPP).

<sup>58</sup> Farm and Ranch Lands Protection Program, 7 C.F.R. § 1491.1 (2002). This preservation program extends to all 50 states, District of Columbia, Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. *Id.*

<sup>59</sup> *Id.* The NRCS can provide matching funds to eligible entities; however, the NRCS cannot provide more than fifty percent of the appraised fair market value. 7 C.F.R. § 1491.4 (2007).

<sup>60</sup> Zinn, *supra* note 55, at 12. Between 1996 and 2005, \$371 million was spent in order to acquire 1,217 easements on 257,101 acres, with an additional 1,073 easements on 192,076 acres pending. *Id.* In the 2006 fiscal year, \$74 million of federal money was spent, and \$50 million was requested for the 2007 fiscal year. *Id.* According to the 2007 fiscal year budget, "[t]he demand for the program has exceeded available funds by approximately 300 percent." *Id.* In 2004, 216 applications, with a total cost of \$101 million if they were approved to enroll over 48,000 acres of farmland, were unable to be funded. *Id.*

agricultural production capacity of the land.<sup>61</sup> While the federal government has provided some limited protection of agricultural land, farmland has also been preserved through state legislation.<sup>62</sup>

## 2. State Legislation

Until the late 1970s, Congress rejected legislation because it believed that farmland protection should be a state or local matter.<sup>63</sup> The most common legislation includes right-to-farm laws and differential assessment for property taxes.<sup>64</sup> The majority of states and counties also have additional protections such as agricultural districts, agricultural protection zoning, comprehensive growth management, and conservation easements.<sup>65</sup> The choice of each state in enacting these laws is an expression of public preference on the importance of orderly development, food security, local economy, environmental services, and protection of rural amenities.<sup>66</sup>

States have enacted different types of preservation programs in order to suit their needs, because "[t]here is no 'one-size-fits-all'

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<sup>61</sup> American Farmland Trust: Federal Policy Updates, Changes to the Federal Farm and Ranch Land Protection Program, [http://www.farmland.org/programs/federal/Federal\\_Updates/08222006FRPP.asp](http://www.farmland.org/programs/federal/Federal_Updates/08222006FRPP.asp) (last visited Oct. 9, 2006). "The first attempts to amend the FRPP statute occurred at the end of July when Senator Rick Santorum (R-PA) introduced S[en. Bill] 3720 and Rep. Tim Holden (D-PA) introduced H.R. 6000." *Id.* The bills differ, but contain "a few common themes in attempt to address complaints expressed by cooperating entities. . . . They both outline a certification process for cooperating entities that was originally proposed by the Northeast Association of State Departments of Agriculture (NEASDA) in a letter to the NRCS." *Id.* The FRPP's authorization expired in September, 2006. *Id.*

<sup>62</sup> See *infra* Part II.B.2.

<sup>63</sup> Eitel, *supra* note 43, at 597. Washington Senator Henry Jackson introduced the Land Use Policy and Planning Assistance Act in 1972 and 1973, which was intended to "encourage systematic attention to development patterns and to bring some consistency to state efforts." *Id.* (internal quotations omitted).

<sup>64</sup> Public Preference, *supra* note 32, at 21. All fifty states enacted a right-to-farm law, preventing nuisance actions when new non-agricultural residents move into agricultural areas. *Id.* All states have a program designed to reduce the amount of property taxes farmers pay, however, three states (Michigan, New York, and Wisconsin) allow farmers to claim state income tax credits to offset their tax bill. *Fact Sheet: Differential Assessment and Circuit Breaker Tax Programs*, American Farmland Trust, at 1 (Aug. 2006). Using differential assessment, "officials . . . assess farmland at its agricultural use value," instead of fair market value. *Id.*

<sup>65</sup> Public Preference, *supra* note 32, at 20.

<sup>66</sup> *Id.* The rural amenities most often mentioned for legislative purpose are open space, rural/agrarian character and active agriculture, wildlife habitat/natural area, and aesthetics. *Id.*

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program.”<sup>67</sup> Oregon utilizes an Exclusive Farm Zone, where farms enjoy even more protection from the local zoning authorities, and only defined farm uses are allowed within these zones which are created according to a comprehensive plan.<sup>68</sup> Maryland and Vermont give high priority to parcels of land that contribute significantly to the local agricultural economy.<sup>69</sup> These same states also give priority to land with road frontage to ensure scenic vistas to the traveling public.<sup>70</sup> Alternatively, Pennsylvania’s Farmland Preservation Program purchases development rights or easements by using a portion of cigarette tax revenues in order to limit urban sprawl, protect productive farmland, and maintain farmland as a viable economic activity.<sup>71</sup> Kentucky became the first state to create an urban growth boundary, which it placed around the city of

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<sup>67</sup> Public Preference, *supra* note 32, at 27 (internal quotations omitted).

<sup>68</sup> OR. REV. STAT. § 215.203(2)(a) (2005). Farm use is defined as:  
the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “Farm use” includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. “Farm use” also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. “Farm use” also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. “Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. “Farm use” does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267 (3) or 321.824 (3).

*Id.*

<sup>69</sup> Public Preference, *supra* note 32, at 26. By giving preservation preference to lands that benefit the local agricultural economy, viability of agriculture is maintained in that county. *Id.* It may be important to note that Maryland’s top five agricultural commodities in 2004 were “broilers, greenhouse/nursery products, milk and dairy products, corn, and soybeans” which differs dramatically from Indiana’s agricultural scheme. Maryland Department of Agriculture, Annual Report, *available at* [http://www.mda.state.md.us/pdf/05mda\\_ar.pdf](http://www.mda.state.md.us/pdf/05mda_ar.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 33 (2002). The criteria for Pennsylvania to purchase the development rights are: (1) Land evaluation based on soil productivity, (2) development protection, (3) farmland potential, and (4) clustering potential. *Id.*

Lexington in order to protect Bluegrass Country in 1958.<sup>72</sup> Because agricultural land preservation programs must be built to support the peculiarities of a state, the plans of other Corn Belt states may be more similar to Indiana's issues and goals.<sup>73</sup>

The basic agricultural preservation laws which all Corn Belt states have are right-to-farm laws, differential assessments, and conservation easement programs.<sup>74</sup> Missouri's preservation scheme is limited to these basic laws.<sup>75</sup> In Illinois, only a few counties have enabled legislation regarding conservation easements and agricultural districts or zoning. Besides the basic preservation laws common in Corn Belt states, however, Illinois has also enabled agricultural districts throughout the state.<sup>76</sup> Similar to Illinois, Ohio has statewide agricultural districts, but

<sup>72</sup> BRENT W. AMBROSE & JOHN GONAS, UK CENTER FOR REAL ESTATE STUDIES, URBAN GROWTH CONTROLS AND AFFORDABLE HOUSING: THE CASE OF LEXINGTON, KENTUCKY FINAL REPORT 2 (Jan. 2003), [http://www.lfuchrc.org/Fair\\_Housing/Lexington\\_Zoning\\_Report\\_3\\_edited.pdf](http://www.lfuchrc.org/Fair_Housing/Lexington_Zoning_Report_3_edited.pdf) (last visited Oct. 10, 2006). An Urban Growth Boundary is a line drawn that prohibits development outside of the line, causing growth inwards to urban areas. Rachel D. Jaffe, Note, *Stopping Sprawl in Lancaster County, Pennsylvania: Making the Case for Mandatory Urban Growth Boundaries*, 24 TEMP. ENVTL. L. & TECH 143, 146 (2005).

<sup>73</sup> Almost 50% of American corn is grown in Iowa, Illinois, Indiana, and Ohio. The Corn Belt also consists of parts of South Dakota, Nebraska, Kansas, Minnesota, Wisconsin, Michigan, Kentucky, and Missouri. Purdue University, [http://pasture.ecn.purdue.edu/AGEN521/epadir/erosion/corn\\_belt.html](http://pasture.ecn.purdue.edu/AGEN521/epadir/erosion/corn_belt.html) (last visited Jan. 12, 2007).

<sup>74</sup> See *infra* notes 75-79 (citing to the statutes in Corn Belt states creating right-to-farm laws, differential assessment, and a conservation easement program).

<sup>75</sup> MO. REV. STAT. § 537.295 (2005) (right-to-farm statute); MO. REV. STAT. § 137.017.021 (2005) (differential assessment statute); MO. REV. STAT. §§ 67:870-67:910 (2004) (agricultural easement enabling statute).

<sup>76</sup> PLAINFIELD, ILL. ZONING CODE, ch. 9, art. 5, § 9-41-7. In Illinois, Plainfield seems the most interested in agricultural preservation, creating an agricultural district and agricultural zoning ordinances. Boone County (Ordinance 06-18 (2006)) and Kendall County (2005) have agricultural conversion easement programs. 740 ILL. COMP. STAT. 70/0.01-5 (2005) (right-to-farm statute); 35 ILL. COMP. STAT. 200/10-110-69 (2005) (differential assessment statute); 765 ILL. COMP. STAT. 120/0.01-6 (2005) (agricultural easement statute). However, of particular interest for this Note is the Illinois Agricultural Districts Enabling Statute. 765 Ill. Comp. Stat. 120/0.01 to 120/6 (2005). In order to create an agricultural district the following criteria are considered:

Sec. 8. Factors for Consideration in Formation of Agricultural Areas.

(a) The following factors should be considered by county boards, county committees, or planning commissions, with respect to the formation of any agricultural area:

1. the viability of active farming within the proposed area and in areas adjacent thereto;
2. the presence of any viable farmlands within the proposed area and adjacent thereto that are not now in active farming;
3. the nature and extent of land uses other than active farming within the proposed area and adjacent thereto;
4. county developmental patterns and needs;

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also has agricultural security areas within these agricultural districts.<sup>77</sup> Iowa's current legislation for agricultural protection compares to other

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5. the existence of a conservation plan approved by the local soil and water conservation district; and

6. any other matter which may be relevant.

(b) In judging viability, any relevant agricultural information shall be considered, including soil, climate, topography, other natural factors, markets for farm products, the extent and nature of farm improvements, the present status of farming, anticipated trends in agricultural economic conditions and technology, and such other factors as may be relevant.

505 Ill. Comp. Stat. 5/8 (2005).

<sup>77</sup> The right-to-farm statute is located at OHIO REV. CODE § 3767.13(D) (2005). The differential assessment statute is located at OHIO REV. CODE §§ 5713.30-5173.99 (2005). The agricultural easement enabling statute is located at OHIO REV. CODE §§ 5301.67-5301.70 (2004). The considerations for an agricultural district are as follows:

Any person who owns agricultural land may file an application with the county auditor to place the land in an agricultural district for five years if, during the three calendar years prior to the year in which that person files the application, the land has been devoted exclusively to agricultural production or devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government and if:

(1) The land is composed of tracts, lots, or parcels that total not less than ten acres; or (2) The activities conducted on the land produced an average yearly gross income of at least twenty-five hundred dollars during that three-year period or the owner has evidence of an anticipated gross income of that amount from those activities. The owner shall submit with the application proof that the owner's land meets the requirements established under this division. If the county auditor determines that the application does not meet the requirements of this section, the county auditor shall deny the application and notify the applicant by certified mail, return receipt requested, within thirty days of the filing of the application. The applicant may appeal the denial of the application to the court of common pleas of the county in which the application was filed within thirty days of the receipt of the notice. If the county auditor determines that the application meets the requirements of this section, the county auditor shall approve the application and notify the applicant within thirty days of the filing of the application. An application that is not denied shall be deemed to be approved. The county auditor shall provide an applicant with a copy of an approved application within thirty days of the filing of the application. An application that is approved is effective upon the date of the filing of the application.

Ohio Rev. Code § 929.02 (2005).

This differs from an agricultural security area, which is created when:

(B) An area shall be established as an agricultural security area when all of the following criteria are satisfied:

(1) The area consists of not less than five hundred acres of contiguous farmland that is located in the unincorporated area of a township or

Corn Belt states, including agricultural district enabling statutes.<sup>78</sup> However, the Iowa legislature has recognized the link between preserving farmland and promoting biofuel and has new legislation that bolsters these goals by proposing to remove an exemption that allows

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county. In order to satisfy this requirement, two or more owners of contiguous farmland may aggregate their land.

(2) The land forming the area is in an agricultural district or districts established under Chapter 929. of the Revised Code.

(3) The land forming the area is valued and assessed for real property tax purposes in accordance with its current agricultural use value under sections 5713.30 to 5713.38 of the Revised Code. Land forming the area that is a portion of a farm on which is located a dwelling house, a yard, or outbuildings such as a barn or garage shall be deemed to satisfy the criteria established in divisions (B)(1) and (3) of this section.

(4) Each application submitted by the owner or owners of the land forming the area is approved under section 931.03 of the Revised Code by the boards of township trustees of all of the townships in which the land is located.

(5) Each application submitted by the owner or owners of the land forming the area is approved under section 931.03 of the Revised Code by the boards of county commissioners of all of the counties in which the land is located.

OHIO REV. CODE § 931.02 (2005).

<sup>78</sup> The right-to-farm statute is located at IOWA CODE §§ 172D.1-172D.4 (2005). The differential assessment statute is located at IOWA CODE §§ 384.1, 441.21 (2005). The agricultural easement enabling statute is located at IOWA CODE §§ 457A.1-457A.8 (2005). The Agricultural Districts Enabling Statute creates a land use plan using the following factors:

By March 1, 1985, after at least one public hearing, a county commission shall propose to the county board a county land use plan for the unincorporated areas in the county, or it shall transmit to the county board the county land use inventory completed pursuant to section 352.4 together with a set of written findings on the following factors considered by the county commission: *a.* Methods of preserving agricultural lands for agricultural production. *b.* Methods of preserving and providing for recreational areas, forests, wetlands, streams, lakes and aquifers. *c.* Methods of providing for housing, commercial, industrial, transportation and recreational needs. *d.* Methods to promote the efficient use and conservation of energy resources. *e.* Methods to promote the creation and maintenance of wildlife habitat. *f.* Methods of implementing the plan, if adopted, including a formal countywide system to allow variances from the county plan that incorporates the examination of alternative land uses and a public hearing on such alternatives. *g.* Methods of encouraging the voluntary formation of agricultural areas by the owners of farmland. *h.* Methods of considering the platting of subdivisions and its effect upon the availability of farmland.

IOWA CODE § 352.5 (2005).



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government to build on farmland and also establishes a statewide renewable fuels standard.<sup>79</sup>

### 3. Indiana Legislation

Like all the other Corn Belt states, Indiana has a right-to-farm law. Indiana passed this legislation in 1981 as the first statewide legislation to protect farmland.<sup>80</sup> Right-to-farm laws protect agricultural operations by prohibiting people from moving into established agricultural areas and then maintaining actions for nuisance because the ordinary smells and activities of the farm offend their senses.<sup>81</sup> Although the Legislature repealed the original statute, it replaced the statute with virtually identical legislation in 2005.<sup>82</sup> The new right-to-farm legislation,

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<sup>79</sup> The proposed new legislation establishes renewable fuels goals, mandating that by 2025 biofuel will replace twenty-five percent of all petroleum used in making gasoline. H.F. 2754, 81st Gen. Assem., Reg. Sess. (Iowa 2006). The bill provides incentives for creating infrastructure to store and dispense renewable fuel and provides related income tax credits, excise taxes and penalties. *Id.* Iowa further plans to protect its farmland by removing an exemption in Iowa's current law allowing government to condemn agricultural property for an industrial project that qualifies under the New Jobs and Income Program. H.F. 2351, 81st Gen. Assem., Reg. Sess. (Iowa 2006).

<sup>80</sup> IND. CODE § 34-19-1-4 (1981) (repealed 2002). The 2005 amendment, *infra* note 82, changed part (d), which originally read:

An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if:

- (1) there is no significant change in the hours of operation;
- (2) there is no significant change in the type of operation; and
- (3) the operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.

*Id.*

<sup>81</sup> *Shatto v. McNulty*, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987). The court held that a hog farm that had been operating continuously for 30 years was protected against nuisance actions under Indiana Code § 34-19-1-4. *Id.* "The policy of the legislature is clear. People may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits." *Id.*

<sup>82</sup> IND. CODE § 32-30-6-9 (Supp. 2006). The pertinent text reads:

(a) This section does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances.

(b) The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result,

"declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products."<sup>83</sup> However, the law limits protection to agricultural operations which have been in operation continuously for a year without any significant change in the type of agricultural operation.<sup>84</sup>

Besides the enactment of the right-to-farm law in 1981, Indiana took no statewide action until 1997 when Governor Frank O'Bannon created the Hoosier Farmland Preservation Task Force ("Preservation Task

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agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

(c) For purposes of this section, the continuity of an agricultural or industrial operation shall be considered to have been interrupted when the operation has been discontinued for more than one (1) year.

(d) An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if the following conditions exist:

- (1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:
  - (A) The conversion from one type of agricultural operation to another type of agricultural operation.
  - (B) A change in the ownership or size of the agricultural operation.
  - (C) The:
    - (i) enrollment; or
    - (ii) reduction or cessation of participation; of the agricultural operation in a government program.
  - (D) Adoption of new technology by the agricultural operation.
- (2) The operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.

*Id.*

<sup>83</sup> IND. CODE § 32-30-6-9(b) (2006). Along with the quoted state policy, the purpose of the action is, "to reduce the loss to the state of its agricultural resources by limited the circumstances under which agricultural operations may be deemed a nuisance." *Id.*

<sup>84</sup> IND. CODE § 32-30-6-9(d)(1) (2006). The exceptions to these limitations are: "[t]he conversion from one type of agricultural operation to another . . . [a] change in ownership or size of the agricultural operation . . . [a]doption of new technology . . . [t]he enrollment; or reduction or cessation of participation; of the operation in a government program." *Id.*

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Force").<sup>85</sup> The Preservation Task Force's final report in 1999 encouraged planned growth and protection of farms and private property rights.<sup>86</sup> Pursuant to the Preservation Task Force's recommendations, the 1999 Indiana General Assembly created the Indiana Land Resources Council and Governor O'Bannon signed the bill into law in July 1999.<sup>87</sup> The 2006

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<sup>85</sup> Frank O'Bannon, Executive Order 97-27 (Aug. 1997). The purpose of the task force was to "[e]xamine historical trends, causes, and consequences of the conversion of agricultural land to non-agricultural uses; [i]dentify voluntary methods and incentives for preserving and maintaining land for agricultural production; and [p]rovide recommendations for enhancing the continued vitality of agricultural activity and for protecting constitutional private property rights." *Id.*

<sup>86</sup> Joe Tutterow, *Around the Great Lakes: Spotlight on Pennsylvania Farmland Preservation*, SHORELINES, Winter 2001, at 6, available at <http://www.in.gov/dnr/lakemich/pdf/shorelines/winter2001.pdf>. The task forces other recommendations were:

1. Establish an Indiana Land Resources Council.
2. Require farmland impact assessments from Indiana Departments of Commerce and Transportation.
3. Adopt local ordinances which encourage greater housing density.
4. Enact enabling legislation allowing local areas to voluntarily adopt the following programs: Agricultural Protection Zoning, Agricultural District Programs, Purchase of Development Rights, and Transfer of Development Rights.
5. Foster and enhance urban revitalization programs.
6. Protect the right to farm and private property rights.
7. Develop incentives to encourage development where infrastructure is in place.
8. Update land classification using geographical information systems.
9. Encourage development along existing sewer lines.

*Id.*

<sup>87</sup> IND. CODE § 15-7-9-4 (2006). According to § 15-7-9-7, the powers of the council are:

- (1) Provide technical assistance and information about land use strategies.
- (2) Facilitate collaboration among commonly affected state, county, and local government units.
- (3) Compile and maintain a land planning information library, both hard copy and electronic, that includes current data on land resources in Indiana.
- (4) Establish or coordinate educational programs for governmental units, nongovernmental units, and the public with special consideration for local planning commission members and county commissioners.
- (5) Provide counties and local communities conducting land use planning with access to technical and legal assistance through a referral service.
- (6) Provide information to local authorities on model ordinances for programs and techniques on land use.
- (7) Obtain grants and assist counties and local communities in locating additional funding sources for planning projects.
- (8) Make recommendations to the general assembly and other governmental bodies concerning land resources.

Indiana General Assembly renewed the Council's duties with the introduction and passage of Senate Bill 392, legislation similar to the federal government's FPPA, regarding growth related projects and land conservation.<sup>88</sup>

Indiana's initial legislative intent solely concerned food security, but Indiana's legislation is similar to other states' legislation.<sup>89</sup> In 1984, the Indiana General Assembly passed the Uniform Conservation Easement Act and subsequently recodified it in 2002.<sup>90</sup> In order to maintain the economic viability of farming, Indiana uses differential assessment to reduce the amount of money farmers must pay for their property taxes.<sup>91</sup>

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(9) When requested, advise the general assembly on proposals relating to land resources.

IND. CODE § 15-7-9-7 (1999).

<sup>88</sup> S.B. 392, 114TH LEG., 2D SESS. (IND. 2006). Effective July 1, 2006, this Indiana bill "[p]rohibits various state agencies from funding growth related projects in certain areas" and "[r]equires the department of local government finance to give priority to school construction projects that: (1) renovate or expand existing school buildings; (2) are located in existing neighborhoods; (3) do not contribute to the conversion of farm lands; and (4) do not require new water or sewer infrastructure." *Id.* This bill also "[e]stablishes the Hoosier legacy fund to fund eligible projects under the United States Department of Agriculture's farmland preservation and forest legacy programs" and "[a]uthorizes the Land Resources Council to identify priority funding areas and perform certain other tasks." *Id.*

<sup>89</sup> Public Preference, *supra* note 32, at 22, Table 2b. Illinois' legislative intent includes orderly development, food security, local economy, environmental services, protection of the rural amenities of open space, rural character and active agriculture, wildlife habitat, and aesthetics. *Id.* Iowa's legislative intent includes orderly development, food security, local economy, and protection of the rural amenities of open space, rural character and active agriculture, wildlife habitat, and aesthetics. *Id.* Missouri's legislative intent includes orderly development, local economy, environmental services, protection of rural amenities open space, rural character and active agriculture, and aesthetics. *Id.* Ohio's legislative intent includes local economy, environmental services, the protection of the rural amenities of open space, rural character and active agriculture, wildlife habitat, and aesthetics. *Id.*

<sup>90</sup> IND. CODE § 32-5-2.6-6 (1984) (current version at IND. CODE § 32-23-5-1 (2006)). The code defines a conservation easement as:

Sec. 2. As used in this chapter, "conservation easement" means a nonpossessory interest of a holder in real property that imposes limitations or affirmative obligations with the purpose of:

- (1) retaining or protecting natural, scenic, or open space values of real property;
- (2) assuring availability of the real property for agricultural, forest, recreational, or open space use;
- (3) protecting natural resources;
- (4) maintaining or enhancing air or water quality; or
- (5) preserving the historical, architectural, archeological, or cultural aspects of real property.

IND. CODE § 32-23-5-2 (2006).

<sup>91</sup> IND. CODE § 6-1.1-4-4.5(b)(1) (2006).

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Besides these state level preservation projects, other projects are being accomplished on a local level.<sup>92</sup> Clinton County, Indiana, uses sliding scale zoning in which denser development is allowed on lands with poor soil quality and prohibits development on fertile soil.<sup>93</sup> Many other Hoosier counties have created agricultural protection zoning.<sup>94</sup> Besides protective agricultural zoning, in September of 2005, Reynolds, Indiana, became the first "Biotown, USA," by attempting to use all biorenewable resources, including biofuels, to meet the town's energy needs.<sup>95</sup> On a county level, Indiana has demonstrated a dedication to both protecting farmland and using biofuels.<sup>96</sup>

C. *Biofuels: An Energy Alternative*

Since the energy crisis of the 1970s, U.S. energy policy focused on and promoted alternatives to petroleum.<sup>97</sup> Interest was renewed after September 11, 2001, when energy prices jumped and the country sought

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[F]or the property tax assessment of agricultural land for the assessment date in 2005 and 2006, the statewide agricultural land base rate value of eight hundred eighty dollars (\$880) per acre is substituted for the statewide agricultural land base rate value of one thousand fifty dollars (\$1,050) per acre in the real property assessment guidelines of the department of local government finance that apply for those assessment dates[.]

*Id.*

<sup>92</sup> See *infra* notes 93-95 and accompanying text. Examples: Sliding scale zoning in Clinton County, Indiana; Reynolds, Indiana, is now "Biotown, U.S.A.[]" and counties throughout the state use agricultural protection zoning and differential assessment.

<sup>93</sup> Paster, *supra* note 22, at 302. Sliding scale zoning preserves farmland by promoting development on smaller tracts that are on less valuable soil and also prohibiting development on fertile soil. *Id.*

<sup>94</sup> Public Preference, *supra* note 32, at 21, Table 2a.

<sup>95</sup> BioTown, U.S.A., Indiana State Department of Agriculture, <http://www.biotownusa.com> (last visited Oct. 29, 2007). In three phases,

[t]he long term expectation of the BioTown, USA, project is to completely meet all the energy needs of Reynolds via biorenewable resources, including electricity, natural gas replacement, and transportation fuel. Meeting the energy needs of this town with renewable sources will be the first of its kind in the world, while using environmentally friendly technologies that will convert animal and human waste to biogas, which translates into energy.

*Id.*

<sup>96</sup> See *supra* notes 93-95 and accompanying text (describing county-level projects in Indiana protecting farmland and also promoting biofuel).

<sup>97</sup> BRENT D. YACOBUCCI, NATIONAL CENTER FOR SCIENCE EDUCATION, FUEL ETHANOL: BACKGROUND AND PUBLIC POLICY ISSUES (2006), available at <http://ncseonline.org/NLE/CRSreports/06Apr/RL33290.pdf>.

to gain independence from foreign oil.<sup>98</sup> In the 2006 State of the Union Address, President George W. Bush announced an expansion of biofuels research at the Department of Energy and a goal to reduce Middle East oil imports by seventy-five percent by 2025.<sup>99</sup> To achieve this goal, significant federal policies have been established to benefit the ethanol industry, including tax incentives, import tariffs, and mandates for ethanol use.<sup>100</sup> When the FAIR Act of 1996 expired, Congress approved the Farm Security and Rural Investment Act of 2002, which, along with expanding the FRPP, also included energy-related provisions.<sup>101</sup> The development of the biofuels industry has been spurred by federal

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<sup>98</sup> ARS Bioenergy & Energy Alternatives National Program (307), Program Rationale, [https://www.ars.usda.gov/research/programs/programs.htm?np\\_code=307&docid=811](https://www.ars.usda.gov/research/programs/programs.htm?np_code=307&docid=811) (last visited Oct. 9, 2006). "The last decade has been characterized by huge U.S. trade deficits. Petroleum imports account for much of the trade imbalance. In fact, petroleum imports for transportation purposes alone were \$50 billion in 1996." *Id.* The energy issue is not limited to the U.S., however, "[i]n February [2006], the Commission adopted an ambitious EU Strategy for Biofuels." EUROPA—Rapid—Press Releases, Renewable Energy: Commission Proposes to Extend Energy Crop Aid Scheme to All Member States, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1243> (last visited Oct. 29, 2007).

<sup>99</sup> State of the Union: The Advanced Energy Initiative, <http://www.whitehouse.gov/news/releases/2006/01/20060131-6.html> (last visited Oct. 10, 2006). The President urged that America must act now to reduce dependence on foreign sources of energy since there are an estimated 250 million vehicles currently on the road "and Americans will purchase more than 17 million vehicles this year." *Id.* Due to this large number of vehicles currently dependent on foreign sources of energy, "[i]t will take approximately 15 years to switch America's automobiles over to more fuel efficient technologies." *Id.*

<sup>100</sup> Yacobucci, *supra* note 97. See, e.g., The Clean Air Act Amendments of 1990 (requiring the use of oxygenated gasoline) and the Energy Policy Act of 2005 (P.L. 109-58) (establishing a renewable fuels standard mandating the use of ethanol and other renewable fuels in gasoline). Biofuels is a continuing theme for the federal government, and in his 2007 State of the Union Address, President George W. Bush announced:

Let us build on the work we've done and reduce gasoline usage in the United States by 20 percent in the next 10 years. When we do that we will have cut our total imports by the equivalent of three-quarters of all the oil we now import from the Middle East. To reach this goal, we must increase the supply of alternative fuels, by setting a mandatory fuels standard to require 35 billion gallons of renewable and alternative fuels in 2017—and that is nearly five times the current target.

President George W. Bush, *State of the Union Address*, Jan. 23, 2007, <http://www.whitehouse.gov/stateoftheunion/2007/> (last visited Feb. 1, 2007).

<sup>101</sup> 16 U.S.C. § 3830 (2000) (Farm and Ranch Lands Protection Program) (*amended by* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002)). Although this Note will only discuss the interdependence of farmland preservation in order to produce ethanol and biodiesel, the 2002 farm bill amendment contained other important energy provisions, such as: emergency loans to respond to sharply increasing energy costs, biobased product development, and carbon sequestration research, development, and demonstration. *Id.*

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policies that subsidize the cost of producing renewable fuels with the use of tax credits and increased demand by mandating that the fuel industry use a certain amount of renewable fuels.<sup>102</sup>

### 1. Biofuel Creation

The programs developed by the Agricultural Research Service of the USDA focus on the development of two types of alternative fuels: ethanol and agri-biodiesel.<sup>103</sup> Although research continues on other crops which may produce alternative fuels, its current focus is on the traditional Midwestern crops of corn and soybeans.<sup>104</sup> The biofuel industry could reshape agriculture because of the changing use of American farmland for the production of alternative fuels.<sup>105</sup>

Since the cost of production lessens in proximity to the supply of corn, ethanol is produced largely in the Midwest Corn Belt.<sup>106</sup> Approximately fifteen percent of the country's corn production from the 2005 to 2006 growing season will be used to produce fuel alcohol.<sup>107</sup>

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<sup>102</sup> DOUG O'BRIEN, THE NATIONAL AGRICULTURAL LAW CENTER, BIOFUELS: POLICY AND BUSINESS ORGANIZATION ISSUES 2 (2006), available at [http://www.nationalaglawcenter.org/assets/articles/obrien\\_biofuels.pdf](http://www.nationalaglawcenter.org/assets/articles/obrien_biofuels.pdf).

<sup>103</sup> ARS Bioenergy & Energy Alternatives National Program (307), Program Rationale, [https://www.ars.usda.gov/research/programs/programs.htm?np\\_code=307&docid=811](https://www.ars.usda.gov/research/programs/programs.htm?np_code=307&docid=811) (last visited Oct. 9, 2006). The objectives of this program are to reduce the dependency on foreign oil, decrease environmental pollution, enhance farm income, create jobs, and sustainably use renewable agricultural resources and alleviate America's trade imbalance. *Id.*

<sup>104</sup> Yacobucci, *supra* note 97. "[E]thanol can [] be produced from cellulosic material such as switchgrass, rice straw and sugar cane waste. . . [c]orn constitute about 90% of the feedstock for [American] ethanol production." *Id.* "Corn is used because it is a relatively low cost source of starch that can be relatively easily converted to simple sugars, and then fermented and distilled." *Id.* "Agri-biodiesel means biodiesel derived solely from virgin oils, including esters derived from virgin vegetable oils from corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, and mustard seeds, and from animal fats." IRS Pub. No. 378 ¶ 5 (April 2004).

<sup>105</sup> DOUG O'BRIEN, THE NATIONAL AGRICULTURAL LAW CENTER, BIOFUELS: POLICY AND BUSINESS ORGANIZATION ISSUES 1 (2006), available at [http://www.nationalaglawcenter.org/assets/articles/obrien\\_biofuels.pdf](http://www.nationalaglawcenter.org/assets/articles/obrien_biofuels.pdf). "The burgeoning renewable fuels industry has the potential to radically reshape production agriculture." *Id.*

<sup>106</sup> Yacobucci, *supra* note 97, at 3. The Corn Belt consists of the top five corn-producing states: Illinois, Iowa, Nebraska, Minnesota, and Indiana. *Id.* The Corn Belt provides approximately 80% of ethanol production. *Id.* Most ethanol is also used in this region because of high shipping costs, since ethanol-blending gasoline cannot use "petroleum pipes, but must be transported via truck, rail, or barge." *Id.*

<sup>107</sup> ALLEN BAKER & EDWARD ALLEN, UNITED STATES DEPARTMENT OF AGRICULTURE, FEED OUTLOOK 2-3 (Dec. 13, 2005), <http://usda.mannlib.cornell.edu/usda/ers/FDS//2000s/2005/FDS-12-13-2005.pdf>. One Indiana ethanol plant, Iroquois Bio-Energy Co. LLC, will process 35,000 bushels of corn bought from local farmers a day, amounting to about \$36

Production and consumption of ethanol continues to increase to meet the growing demand.<sup>108</sup> Currently, ethanol consumption is blended "gasohol."<sup>109</sup> Although blended with gasoline, gasohol is often more expensive than gasoline and contains a lower energy content, resulting in less fuel economy.<sup>110</sup> Also, the distinctive scent of ethanol production can be unpleasant to live near.<sup>111</sup> Despite these drawbacks, ethanol is readily biogradable and has the potential to be a sustainable fuel unlike petroleum products.<sup>112</sup> Additionally, ethanol's chemical properties make it useful for other applications such as an additive in gasoline.<sup>113</sup>

Similar to ethanol, biodiesel is most commonly blended with diesel fuel.<sup>114</sup> Unlike ethanol, however, biodiesel is made from a combination of soybean oil, recycled cooking oil, or animal fats.<sup>115</sup> As an emerging form of fuel, biodiesel production costs are high, which restrains its use.<sup>116</sup> However, research has shown that biodiesel has special

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million worth of corn annually. Carrie Napoleon, *Ethanol in Pipeline*, POST-TRIBUNE, Jan, 23, 2007, available at <http://www.post-trib.com/news/224349,ethanol.article>.

<sup>108</sup> Yacobucci, *supra* note 97, at 5. Just during 2006, domestic ethanol production capacity is expected to grow from 4.4 billion gallons a year to 6.3 billion gallons per year. *Id.* Due to federal and state incentives, consumption has increased from 1.8 billion gallons per year to 3.4 billion gallons per year between 2001 and 2004. *Id.*

<sup>109</sup> *Id.* Gasohol is any blend of ethanol and gasoline. *Id.* 99% of consumption is E10 (a blend of gasoline and 10% ethanol) and only 1% of consumption is E85 (a blend of 15% gasoline and 85% ethanol). *Id.*

<sup>110</sup> *Id.* at 1-2. The lower energy content of E10 gasohol results in a 2%-3% decrease in miles per gallon fuel economy, although there is no detrimental effect on the efficiency of the engine. *Id.*

<sup>111</sup> Jamie Loo, *Northwest Ethanol Smell Still Lingers: New Iron Salts Helping to Solve Problem, But Regulating Process a Challenge*, SOUTH BEND TRIB., Dec. 14, 2005, available at <http://www.southbendtribune.com/apps/pbcs.dll/article?AID=20051214/News01/512140321/-1/NEWS01/CAT=News01>. The acrid smell comes from the organic waste produced by the ethanol plant. *Id.* To treat the smell, ethanol producers add ferrous chloride to the waste. *Id.* Producers can have difficulties balancing the right amount of ferrous chloride with the variable amount of waste or effluence coming from the plant every day. *Id.*

<sup>112</sup> Yacobucci, *supra* note 97, at 5.

<sup>113</sup> *Id.* Ethanol contains oxygenates which reduce carbon monoxide, volatile organic compound emissions, and replaces other chemicals which are toxic air pollutants. *Id.*

<sup>114</sup> *Biodiesel Fact Sheet*, <http://www.eere.energy.gov/cleancities/blends/pdfs/37136.pdf> (April 2005) (last visited Oct. 10, 2006). Biodiesel is usually offered at B20 (a blend of 80% diesel and 20% biodiesel) or B5 (a blend of 95% diesel and 5% biodiesel). *Id.* In more than fifty million on-road miles, marine, and off-road experiences, biodiesel shows similar fuel consumption, horsepower, torque, and haulage rates as conventional diesel. *Biodiesel Performance*, [http://www.biodiesel.org/pdf\\_files/fuelsheets/Performance.PDF](http://www.biodiesel.org/pdf_files/fuelsheets/Performance.PDF) (last visited Jan. 30, 2007).

<sup>115</sup> *Biodiesel Fact Sheet*, <http://www.eere.energy.gov/cleancities/blends/pdfs/37136.pdf> (April 2005) (last visited Oct. 10, 2006).

<sup>116</sup> ARS Bioenergy & Energy Alternatives National Program, *Action Plan*, [https://www.ars.usda.gov/research/programs/programs.htm?np\\_code=307&docid=281](https://www.ars.usda.gov/research/programs/programs.htm?np_code=307&docid=281)



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lubricating properties beneficial to diesel engines even when used in the lowest combination of diesel and biodiesel.<sup>117</sup> Biodiesel is good for engines and is only marginally more expensive than diesel at the pump because of federal tax incentives for biodiesel production.<sup>118</sup>

Currently, biofuel production relies heavily on tax incentives to keep prices of biofuels competitive against petroleum products.<sup>119</sup> The largest federal government subsidy, the Volumetric Ethanol Excise Tax Credit ("VEETC"), rewards ethanol producers without limit and with no regard to the price of gasoline for every gallon of ethanol blended with gasoline.<sup>120</sup> In order to create a market for the biofuels produced, the federal government also created a Renewable Fuels Standard, requiring a specified level of consumption in the future.<sup>121</sup>

## 2. Indiana's Place in the Biofuel Network

Similar to the Federal government, Indiana has created financial incentives for the production and use of biofuels.<sup>122</sup> In 2006, Indiana

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(last visited Oct. 10, 2006). Research must be done before biodiesel becomes commercially widespread, not only to reduce the costs of production, but also regarding exhaust emissions, fuel quality standards and online testing, feedstock costs, cold flow properties, and storage stability. *Id.*

<sup>117</sup> *Biodiesel Fact Sheet*, <http://www.eere.energy.gov/cleancities/blends/pdfs/37136.pdf> (April 2005) (last visited Oct. 10, 2006). 1% biodiesel fuel combined with diesel fuel can improve the fuel's lubricity by 65%. *Id.*

<sup>118</sup> *Id.* Despite a high cost of production, tax incentives are offered for production of biodiesel and, generally, biodiesel is about five cents more than No. 2 diesel. *Id.*

<sup>119</sup> Seth Slabagh, *Billions Subsidize Ethanol Industry*, THE STAR PRESS, at 1A (Dec. 4, 2006). "When oil prices went high, ethanol could make it without the (VEETC) subsidy, but it's a fixed subsidy," said Chris Hurt, an agricultural economist at Purdue University. "Above \$40 a barrel on oil is about where ethanol could make it on its own, particularly with \$2 a bushel corn," Hurt said. "So let's maybe go to, if oil is \$65 per barrel there is no subsidy." *Id.*

<sup>120</sup> 26 U.S.C. § 40 (2000). VEETC awards a tax refund of 51 cents for every gallon of ethanol blended with gasoline. Seth Slabagh, *Billions Subsidize Ethanol*, THE STAR PRESS, Dec. 3, 2006, at 1A. Critics suggest that VEETC should be amended to a variable subsidy based upon the price of petroleum. *Id.* "[T]ax incentives for ethanol are criticized as 'corporate welfare, encouraging the inefficient use of agricultural and other resources and depriving the government of needed revenues.'" Yacobucci, *supra* note 97, at 12.

<sup>121</sup> The Renewable Fuels Standard mandates "the consumption of at least 7.5 billion gallons of renewable fuel a year by the year 2012." Seth Slabagh, *Billions Subsidize Ethanol*, THE STAR PRESS, Dec. 3, 2006, at 1A. Opponents of the Renewable Fuels Standard argue that it creates an artificial demand for ethanol, causing construction and expansion of ethanol plants which would only increase fuel prices and create instability in the fuel supply chain. Yacobucci, *supra* note 97, at 17.

<sup>122</sup> Indiana government provides subsidies for ethanol producers and retailers. Seth Slabagh, *Billions Subsidize Ethanol*, THE STAR PRESS, Dec. 3, 2006, at 1A. Production credits are awarded to biodiesel, ethanol, and blended biodiesel producers and also to blended

spent the \$50 million authorized for Clean Energy Indiana Production Credits and plans on future spending to continue to make Indiana the leader in biofuels development and production.<sup>123</sup> Indiana's interest in homegrown energy also extends to retailers who benefit by a tax credit for selling biofuel.<sup>124</sup>

Historically, Indiana's foundation is built upon homegrown energy.<sup>125</sup> In the late nineteenth and early twentieth centuries, Indiana built its first large industrial powerhouse over a reserve of natural gas and fields of coal and oil.<sup>126</sup> According to Indiana's Strategic Energy Plan, Indiana's "economy and our social fabric were literally built on a foundation of homegrown energy."<sup>127</sup> Yet despite this foundation, currently seventy-five percent of Indiana's energy expenditures leave the state to pay for coal, oil, and natural gas.<sup>128</sup> Forecasters predicted that Indiana would spend approximately \$14 billion on imported energy in 2006.<sup>129</sup>

However, Indiana hopes to quickly become an exporter of energy resources.<sup>130</sup> Among the available alternatives to reduce this heavy

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biodiesel distributors with a cap of three million dollars to each applicant. <http://www.in.gov/iedc/incentives/cleanEnergy.html> (last visited Feb. 22, 2007).

<sup>123</sup> Gov. Daniels Announces Next Phase of State's Biofuels Policy, (Aug. 29, 2006), <http://news.uns.purdue.edu/UNS/html3month/2006/060829.Daniels.summit.html> (last visited Oct. 24, 2007). Along with developing plants for production of ethanol and biodiesel, Indiana also plans to shift to cellulosic and biomass fuels of the future, and to help develop transportation networks similar to those used for petroleum. *Id.* Through Clean Energy Production Credits, "[q]ualifying ethanol producers could receive a 12.5-cent per gallon credit," but the amount was not to exceed \$3 million per production plant. Seth Slabagh, *Billions Subsidize Ethanol*, THE STAR PRESS, Dec. 3, 2006, at 1A. Thirty five million dollars of the credits were awarded to ethanol producers and the remainder went to biodiesel. *Id.*

<sup>124</sup> Retailers get a 10-cent per gallon tax credit for "selling E85 (motor fuel blends of 85 percent ethanol and 15 percent gasoline)[,]" but "[t]here is a cap of \$2 million on this credit or it ends on July 1, 2008, whichever" occurs first. Seth Slabagh, *Billions Subsidize Ethanol*, THE STAR PRESS, Dec. 3, 2006, at 1A.

<sup>125</sup> STATE OF IND., ECONOMIC GROWTH FROM HOOSIER HOMEGROWN ENERGY: INDIANA'S STRATEGIC ENERGY PLAN 2 (2006) [hereinafter "Hoosier Homegrown Energy"].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 5.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2-4. Erik Anderson, CEO of Louis Dreyfus Agriculture Industries in North America, which is building the world's largest biodiesel plan in Claypool, Indiana, said "Indiana has been the company's 'No. 1 spot.'" Kate Cooper, *Worlds Biggest Biodiesel Plant Coming to Hoosier State: Indiana Now on Leading Edge of Biofuel Industry*, TIMES WASHINGTON BUREAU (March 9, 2006), available at <http://www.commongroundcommonsense.org/forums/lofiversion/index.php/t50946.html>.

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reliance on imported energy is the creation of more ethanol and biodiesel plants to increase use of ethanol for energy.<sup>131</sup> Given Indiana's status as one of the country's top soy and corn producers and its central location, the state is well-suited to become one of the nation's top biodiesel producers and lead the Midwest in this regard.<sup>132</sup> In *Economic Growth from Hoosier Homegrown Energy*, Indiana Governor Mitch Daniels states: "[t]he Midwest really can be the Middle East of biofuels."<sup>133</sup>

While the Hoosier economy benefits from this boom, Indiana farmers also reap the benefits.<sup>134</sup> As the demand for crops increases so does the price of the crops.<sup>135</sup> The land that produces these crops also increases in value as agricultural land.<sup>136</sup> The sustainability of these

<sup>131</sup> Gov. Daniels Announces Next Phase of State's Biofuels Policy, (Aug. 29, 2006), <http://news.uns.purdue.edu/UNS/html3month/2006/060829.Daniels.summit.html> (last visited Oct. 24, 2007). In 2004, Indiana only had one ethanol plant, but in less than eighteen months twelve new ethanol plans have been announced for Indiana. *Id.* Once all of the plants are in full production, the state's ethanol production should be 1.3 billion gallons per year, surpassing the state's 2008 biofuels production goal of 1 billion gallons. *Id.* Currently, three biodiesel plants are also being planned in Indiana at this time, and, in March of 2006, the world's largest biodiesel facility was opened in this state. *See* Hoosier Homegrown Energy, *supra* note 125, at 13.

<sup>132</sup> Hoosier Homegrown Energy, *supra* note 125, at 13. On March 8, 2006, Louis Dreyfus Commodities announced its plans to construct an integrated soybean processing and biodiesel production facility in Claypool, Indiana. Plant to Be Built in Claypool, Indiana (Mar. 8, 2006), <http://www.louisdreyfus.com/content.cfm?page=news.cfm&newsitem=1687&gbus=3> (last visited Oct. 24, 2007). This plant will crush nearly 50 million bushels of soybeans annually, producing over 1 million tons of protein-rich soybean meal and 80 million gallons of biodiesel per year. *Id.* Louis Dreyfus chose Claypool, Indiana, because of its ideal location to receive soybeans from local market neighboring states. *Id.* The company also states that Indiana's competitive truck and rail access to feed markets in Indiana and the Southeast will provide a consistent outlet for soybean meal. *Id.* Additionally, Claypool sits in the center of a growing biodiesel demand in Indiana and surrounding Midwest states. *Id.*

<sup>133</sup> Hoosier Homegrown Energy, *supra* note 125, at 4.

<sup>134</sup> Hold on for better 2007 Indiana Farm Income, Ag Experts Say (Aug. 11, 2006), <http://news.uns.purdue.edu/html3month/2006/060811.Hurt.cropreport.html> (last visited Oct. 24, 2007). Indiana is expected to harvest near-record yields of soybeans and corn in the 2006 harvest. *Id.* Although farm incomes are much lower than last year, Purdue agricultural economist Chris Hurt stated, "[a]s we use more corn for ethanol production, crop prices are likely to go up[.]" *Id.* The state also rewards ethanol producers with ethanol production tax credits for encouragement. In Indiana, a taxpayer that produces ethanol is entitled to a tax credit of "twelve and one-half cents (\$.125) multiplied by the number of gallons of ethanol produced at the Indiana facility." 2006 IND. TAX 31 (LexisNexis 2006).

<sup>135</sup> Hoosier Homegrown Energy, *supra* note 125. An increase in the price paid for crops translates into more jobs and an increased income which could pay farmers up to \$130 per acre. *Id.*

<sup>136</sup> ANDREW J. PLANTINGA, RUBEN N. LUBOWSKI & ROBERT N. STAVINS, THE EFFECTS OF POTENTIAL LAND DEVELOPMENT ON AGRICULTURAL LAND PRICES 15 (2002),

benefits depends on a constant supply of crops for the production of biofuels.<sup>137</sup>

*D. Creating a Constitutional Zoning Standard*

Historically, deciding how a piece of land should be used has been considered an individual's property ownership right.<sup>138</sup> However, in *Village of Euclid v. Ambler Realty*, the United States Supreme Court held that zoning may be used to safeguard and promote the health, safety, and general welfare of the community.<sup>139</sup> In the 1970s, California, Pennsylvania, and Washington began using zoning as a method to protect agricultural land from development and the practice has now spread throughout the country.<sup>140</sup> "Public pressure may prompt a growing number of states to uniformly protect an expansive definition of farming and agriculture in the context of local zoning."<sup>141</sup> The use of agricultural zoning can protect farmland from being converted to non-farmland, prevent the fragmentation of farms, prevent land-use conflicts, and protect farmers from non-agricultural intrusion into farm areas.<sup>142</sup> However, agricultural zoning has a mixed effect on the business of

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[http://ksgnotes1.harvard.edu/Research/wpaper.nsf/e83b5a2a13ee71c78525696f001dca50/bee5dea5d0259c6a85256b6d0075236e/\\$FILE/U.S.%20Ag%20Land%20Prices%206.doc](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/e83b5a2a13ee71c78525696f001dca50/bee5dea5d0259c6a85256b6d0075236e/$FILE/U.S.%20Ag%20Land%20Prices%206.doc) (last visited Oct. 24, 2007). A theoretical model determined that "[i]n the average county, a \$1 increase in the annual per-acre return to agriculture . . . increases the value of agricultural land by \$5.00." *Id.*

<sup>137</sup> Hold on for better 2007 Indiana Farm Income, Ag Experts Say (Aug. 11, 2006), <http://news.uns.purdue.edu/html3month/2006/060811.Hurt.cropreport.html> (last visited Oct. 24, 2007). Currently, the one working ethanol plant in Indiana will use 4% of the projected 2006 Indiana corn crop. *Id.* With plans for all ethanol plants to eventually function within the state, Indiana could use over forty percent of Indiana's corn crop. *Id.* Purdue agricultural economist Chris Hurt stated, "[t]hat's not a transition, that's a revolution." *Id.*

<sup>138</sup> Stephen J. Hudkins, *Agricultural Zoning*, available at <http://ohionline.osu.edu/cd-fact/1266.html>.

<sup>139</sup> 272 U.S. 365, 395 (1926). A landowner contested a zoning ordinance because it reduced the normal value of his property and also deprived him of liberty and property without due process. *Id.* at 384. The ordinance was upheld because it had a rational relation to the health and safety of the community. *Id.* at 395.

<sup>140</sup> *Fact Sheet: Agricultural Protection Zoning*, AMERICAN FARMLAND TRUST, Sept. 1998. By 1981, the National Agricultural Lands Study reported 270 counties with agricultural zoning, and by 1995 this number had increased exponentially to 700 jurisdictions in 24 states. *Id.*

<sup>141</sup> Robert Andrew Branan, *Zoning Limitations and Opportunities for Farm Enterprise Diversification: Searching for New Meaning in Old Definitions*, NAT'L AGRIC. L. CENTER, May 2004, at 4.

<sup>142</sup> Hudkins, *supra* note 138, at 2.

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farming because it can also limit a farmer's financial interest in the land.<sup>143</sup>

Although not all efforts to create agricultural zoning are constitutional, direct challenges to agricultural zoning are rarely successful because the government only has to meet the burden that the rezoning is "fairly debatable."<sup>144</sup> Spot zoning requires specific fact analysis to show that the zoning singled out a "small parcel of land for a use classification different and inconsistent with that of the surrounding area, for the benefit of the owner of such property and to the detriment of the rights of other property owners."<sup>145</sup> In a substantive due process claim, the rezoning "must advance legitimate government interests that serve the public health, safety, morals, and general welfare."<sup>146</sup> For an equal protection claim, the state must show that the zoning regulations are "uniform for each class or kind of use throughout each zoning district."<sup>147</sup> Since the plaintiffs in *City of Monterey v. Del Monte Dunes*<sup>148</sup>

<sup>143</sup> *What About My Equity? The Impacts of Zoning on Farm Business*, AMERICAN FARMLAND TRUST, Oct. 1, 2004. The positive effects on farm business are creating supportive business environment for farms, insuring that future land use patterns are consistent with agricultural production, reducing the risk of farmer/non-farmer neighbor conflict, enhancing farmers' ability to make suitable return on agricultural investments, and maintaining more affordable farmland prices. *Id.* The negative effects on farm business are reducing fair market value of farmland, impacting farmers' borrowing power by reducing farmers' collateral, decreasing farmers' financial flexibility by limiting options for disposing land, and diminishing amounts available to farmers for retirement (with sale of the farm). *Id.*

<sup>144</sup> Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19 J. LAND USE & ENVTL. LAW 59, 61 (2003). The most common legal challenges to "downzoning" are direct challenge to "the act, 'spot zoning,' 'takings,' substantive due process, equal protection and 42 U.S.C. § 1983." *Id.*

<sup>145</sup> *Burkett v. City of Texarkana*, 500 S.W.2d 242, 244 (Tex. Civ. App. 1973). Spot zoning is more likely to constitute a taking. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978). The court held that New York's landmark laws that apply to only select parcels does not constitute spot zoning because they are part of "a comprehensive plan to preserve structures of historic or aesthetic interest." *Id.* Further, the zoning was not a taking because the law had not taken plaintiffs' property without just compensation and did not arbitrarily deprive plaintiffs of their property without Fourteenth Amendment due process of law. *Id.* at 1358. A taking cannot be established by only showing denial of the ability to exploit a property interest that the owners had believed was available for development. *Id.* at 131.

<sup>146</sup> Richardson, *supra* note 144, at 69. "[S]ubstantive due process requires that: . . . there be a valid public purpose for the regulation; . . . the means adopted . . . [are] substantially related" . . . and . . . "the impact of the regulation . . . [is] not . . . unduly harsh." *Id.*

<sup>147</sup> *Id.* at 73. Equal protection is derived from the Fourteenth Amendment, which states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

<sup>148</sup> 526 U.S. 687 (2006). Developer brought suit under § 1983, alleging that it had been denied all economically viable use of the property without compensation and that the decision to reject the development proposal did not substantially advance a legitimate

successfully brought a zoning challenge under 42 U.S.C. § 1983, similar claims may be brought with more frequency in the future.<sup>149</sup>

Challengers to a zoning ordinance most often bring a Fifth Amendment takings challenge.<sup>150</sup> In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court created a test to determine when a government regulation exacts a taking of private property without just compensation.<sup>151</sup> Rezoning land to agricultural use is not

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public purpose. *Id.* at 700. The court held that the question of whether deprivation of use of property advanced legitimate public interests was an issue involving factual considerations normally resolved by juries, but because § 1983 did not confer a right to jury trial, the court applied a U.S. CONST. amend. VII analysis in which a lawsuit under § 1983 was a tort action to which the right of jury trial applied. *Id.* at 709.

<sup>149</sup> Richardson, *supra* note 144, at 75. Section 1983 of Title 42 of the United States Code authorizes a lawsuit based upon violation of any constitutional right and states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

<sup>150</sup> Richardson, *supra* note 144, at 63. In pertinent part, the Fifth Amendment states, "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>151</sup> 505 U.S. 1003 (1992). The landowner purchased two residential lots with the intent to build homes on them. Subsequently, the state enacted the Beachfront Management Act barring the landowner from erecting any permanent structures on the land. *Id.* at 1007. The landowner asserted that the act constituted a taking. *Id.* at 1006. The court held that where a state seeks to sustain a regulation that deprives land of all economically beneficial use, it does not have to compensate the owner if before the owner purchased the land the interests were not a part of the title. *Id.* at 1027. The test asks:

A. Is the purpose of the regulatory action a legitimate state interest? . . . B. Does the means used to achieve the objective substantially advance the intended state purpose? . . . C. Does the alleged taking compel the property owner to suffer a physical invasion of property (or the equivalent)? . . . D. 'No economically viable use' test: . . . 2. I. Does the regulation simply make explicit what already inheres in the title itself, in the restrictions that the background principles of the state's laws of nuisance already imposed on the landowner? . . . E. Apply the Penn Central balancing: . . . 1. the economic impact of the regulation on the owner; 2. the landowner's

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inherently unfair so as to constitute a taking, but may be considered unfair under certain circumstances because of the significant reduction in property values it can cause.<sup>152</sup> A significant reduction in property value is balanced against competing interests, such as the public's general welfare.<sup>153</sup> The preservation of American farmland has long been held to be a legitimate state interest by both federal and state governments.<sup>154</sup>

## III. ANALYSIS

Although, in the past, federal, state, and local governments have worked to preserve farmland, Indiana should take further steps to preserve its farmland as the country increases its production and use of biofuels.<sup>155</sup> As the popularity of biofuel grows, so does America's dependence on its farmland to produce the raw materials needed for biofuel production.<sup>156</sup> Corn and soybeans are necessary to make these alternative sources of fuel.<sup>157</sup> Indiana is in a position to play a key role in the country's biofuel production, but to do so it must retain its current farmland as viable to grow crops necessary for making alternative energy.<sup>158</sup>

This Part evaluates current preservation programs and how the development and production of biofuels should play a role in creating a

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investment backed expectations; and, 3. the character of the government activity."

Jesse J. Richards, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 131-32 (2000).

<sup>152</sup> Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. LAW 371, 381 (2005). The author argues that agricultural zoning is not inherently unfair because a substantial portion of private property value is often created by government givings, the reciprocal nature of burdens and benefits, and it neglects the social dimension of property rights. *Id.*

<sup>153</sup> *Lucas*, 505 U.S. at 1023-49 (holding that preservation of beachfront property is a legitimate state interest; therefore, the restrictive zoning did not constitute a taking).

<sup>154</sup> 7 U.S.C. § 4201(a)(1) (stating the federal legislative goal is to protect farmland); *see also* IND. CODE § 34-18-1-4 (1984) (repealed 2002) (stating Indiana's legislative goal to protect farmland).

<sup>155</sup> *See supra* Part II.B (discussing the legislation and conservation schemes used by federal government and state governments, including Indiana's current policies).

<sup>156</sup> *See supra* Part II.C (surveying how America's goal to become independent from foreign sources of energy has led to the development and encouragement of using biofuels, which use homegrown crops for their creation).

<sup>157</sup> *See supra* Part II.C.1; Part II.C.2 (explaining that the primary crops grown in Indiana are also the current primary crops used to produce alternative sources of fuel).

<sup>158</sup> *See supra* Part II.C.2 (exploring how Indiana's location, current agricultural resources, and state government's goals place it in a prime position to be a biofuel production leader).

zoning standard in Indiana to preserve agricultural land.<sup>159</sup> First, Part III.A analyzes the effectiveness of the federal preservation programs.<sup>160</sup> Then, Part III.B examines Indiana's current preservation scheme and how other states' methods would or would not work for Indiana.<sup>161</sup> Further, Part III.C evaluates how the preservation of agriculturally zoned land affects the production, price, and availability of biofuels.<sup>162</sup> Finally, Part III.D analyzes how a new zoning standard in Indiana to protect farmland would also promote biofuels.<sup>163</sup>

A. *Federal Recognition of the Problem Is Not Enough*

Despite the United States's long history of an agriculture-based economy, only recently has federal legislation to protect farmland slowly developed.<sup>164</sup> When the federal government began to protect farmland, the first Congressional findings were limited in scope.<sup>165</sup> Perhaps because of the limited Congressional findings, legislation produced from these findings, the FPPA, did not effectively produce substantive results.<sup>166</sup> Since the FPPA only mandates agency process, a federal agency only

<sup>159</sup> See *infra* Part III (analyzing current federal and state agricultural preservation programs and their intersection with developing biofuel issues for purposes of creating a zoning standard workable for Indiana).

<sup>160</sup> See *infra* Part III.A (evaluating the deficiencies of the FPPA and the FRPPA).

<sup>161</sup> See *infra* Part III.B (analyzing the strengths and weaknesses of other states' conservation programs in comparison to Indiana's current agricultural land preservation programs).

<sup>162</sup> See *infra* Part III.C (discussing how preserving agricultural land in Indiana through protective zoning benefits the state's goal of becoming more energy independent by making biofuel a more viable source of energy).

<sup>163</sup> See *infra* Part III.D (explaining how protecting farmlands through a new zoning standard would also encourage the production of biofuels).

<sup>164</sup> See *supra* notes 45-48. The federal government did not take any affirmative action to preserve farmland until after the eighteen-month assessment was completed by the USDA and President's Council in 1979. *Id.* Even after the completion of the assessment, the FPPA was not passed until 1981. See *supra* notes 45-47. At that time, the Congressional findings were limited in scope and only recognized that farmland should be protected to produce food and fiber, and that using the land for non-agricultural purposes harms the economy of rural areas. 7 U.S.C. § 4201(a) (2006). The FPPA's findings include that farmland, "provides food and fiber necessary for the continued welfare of the people... [the] continued decrease to the Nation's farmland base may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets" and using farmland for non-agricultural purposes, "undermines the economic base of many rural areas." *Id.*

<sup>165</sup> Public Preference, *supra* note 32, at 20. States, in enacting their own legislation, have also mentioned the legislative purposes of open space, rural/agrarian character and active agriculture, wildlife habitat/natural area, and aesthetics. *Id.* This Note also proposes that production of biofuel should also be a factor in creating farm preservation legislation. See *infra* Part IV.

<sup>166</sup> Eitel, *supra* note 43, at 598.



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has to examine the impact and alternatives for funding a project that would result in the conversion of farmland.<sup>167</sup> Due to the permissive language of the FPPA, a federal agency can, after making the requisite examinations, choose to fund a project that will result in the conversion of farmland.<sup>168</sup> While the FPPA does give an agency the power to choose a path that will preserve farmland, the ability to choose makes the program less effective since the choice will not always be in favor of farmland preservation.<sup>169</sup>

However, the federal government recognized the FPPA's inefficiency and gave more strength to its agricultural preservation scheme in the FRPP.<sup>170</sup> While the FRPP conclusively protects land by funding conservation easements, the amount of funding given to the NRCS limits its success.<sup>171</sup> The current program effectively retains the farmland enrolled in the program, but only a limited amount of farmland can participate.<sup>172</sup> The current federal legislation does not meet the demand for farmland protection, as the 2007 fiscal budget reports the demand for enrollment exceeded the available funds by about 300 percent.<sup>173</sup> The FRPP has demonstrated that the issue of agricultural preservation is too large and widespread to be efficiently served by a program that requires funding.<sup>174</sup> Indiana further demonstrated another problem with the FRPP, as no one in the state even applied for funding

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<sup>167</sup> 7 U.S.C. § 4201(a)(7). The language of the FPPA is clearly only permissive, [T]he Department of Agriculture and other Federal agencies *should* take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses *in cases* in which other national interests do not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources.

*Id.* (emphasis added).

<sup>168</sup> *Id.* Although federal agencies "should" take steps to preserve farmland, they have the option of deciding that other national interests override the importance of protecting farmland. *Id.*

<sup>169</sup> Eitel, *supra* note 43, at 598.

<sup>170</sup> See *supra* notes 54-61 (regarding the changes made in agricultural land preservation when the federal government enacted the FRPP).

<sup>171</sup> See *supra* notes 59-60 and accompanying text (stating that requests for funding of easements far exceeds the amount of funds available through the FRPP).

<sup>172</sup> See *supra* notes 59-60 and accompanying text (stating that requests for funding of easements far exceeds the amount of funds available through the FRPP).

<sup>173</sup> See *supra* notes 59-60 and accompanying text (stating that requests for funding of easements far exceeds the amount of funds available through the FRPP).

<sup>174</sup> Compare funding conservation easements to funding for biofuel subsidization. Governments may decide to stop or reduce funding, even if the funding is not adequate to begin with. See *supra* notes 59-60 and accompanying text (stating that requests for funding of easements far exceeds the amount of funds available through the FRPP).

during the 2005 fiscal year.<sup>175</sup> Indiana's current preservation plan does not adequately fill the gap that the federal legislation has left in preserving farmland.<sup>176</sup>

*B. Preserving Farmland at the State Level*

1. Indiana

Despite current federal and state protections of farmland, Indiana ranks seventh in the country for loss of farmland.<sup>177</sup> Following the federal government's lead, Indiana first enacted its right-to-farm law the same year as the FPPA.<sup>178</sup> Although right-to-farm laws protect farmers by exempting them from nuisance suits resulting from non-negligent operation of a farm, Indiana limits this protection only if the operation has been in use continuously for more than one year without a significant change in operation.<sup>179</sup> If there has been a gap in agricultural operation for more than a year, Indiana farmers cannot use the right-to-farm law for protection against nuisance suits.<sup>180</sup> The Indiana legislature recently broadened farmers' rights by creating exceptions for the "no significant change in the type of operation" requirement.<sup>181</sup> These new

<sup>175</sup> American Farmland Trust: Resources: State Agriculture Profile: Indiana, [http://www.farmland.org/resources/profiles/state\\_profile.asp?stname=Indiana](http://www.farmland.org/resources/profiles/state_profile.asp?stname=Indiana) (last visited Oct. 24, 2007). In Indiana, \$383,273 was budgeted for the fiscal year of 2005 and the program received zero requests for funding. *Id.*

<sup>176</sup> See *infra* notes 177-204 and accompanying text (illustrating Indiana's current farmland protection policies and their deficiencies).

<sup>177</sup> American Farmland Trust: Resources: Farming on the Edge Report, <http://www.farmland.org/resources/fote/states/top20.asp> (last visited Oct. 26, 2007). The top six states in loss of farmland are: Texas, Ohio, Georgia, North Carolina, Illinois, and Pennsylvania. American Farmland Trust: Resources: Farming on the Edge Report: Top 20 States, <http://www.farmland.org/resources/fote/default.asp> (last visited Oct. 26, 2007).

<sup>178</sup> IND. CODE § 34-19-1-4 (1981) (repealed 2002). Both the FPPA and Indiana's right-to-farm law went into effect in 1981. *Id.*

<sup>179</sup> IND. CODE § 32-30-6-9(d) (2006).

<sup>180</sup> IND. CODE § 32-30-6-9(c) (2006). "For purposes of this section, the continuity of an agricultural or industrial operation shall be considered to have been interrupted when the operation has been discontinued for more than one (1) year." *Id.*

<sup>181</sup> IND. CODE § 32-30-6-9(d)(1) (2006).

(1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:

(A) The conversion from one type of agricultural operation to another type of agricultural operation.

(B) A change in the ownership or size of the agricultural operation.

(C) The: (i) enrollment; or (ii) reduction or cessation of participation; of the agricultural operation in a government program.

(D) Adoption of new technology by the agricultural operation.

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exceptions exclude changing from one type of agricultural operation to another, a change in ownership or size of the agricultural operation, the participation in a government program, and the adoption of new technology.<sup>182</sup> Current protection of agricultural land does not suffice because, while the continuity requirement and significant change in operation requirement protect farms and farmers, these requirements do not protect the agriculturally viable land itself.<sup>183</sup>

The philosophy behind this law is that nuisance suits cause agricultural operations to “cease operations, and many persons may be discouraged from making investments in farm improvements.”<sup>184</sup> Indiana’s right-to-farm law may encourage current farmers to continue farming and investing in their farms, even when faced with nonagricultural land uses becoming their neighbors, but it does not definitively protect their farmland.<sup>185</sup> Farmers face other issues besides nuisance litigation when confronting urban sprawl, yet current state law only indemnifies farmers for this one type of litigation.<sup>186</sup>

While Indiana’s right-to-farm law helps to protect farmers against penalties, other Indiana laws give incentives for farmers to continue to farm.<sup>187</sup> First, using differential assessment of agricultural land, landowners pay a reduced amount of property tax.<sup>188</sup> Because the agricultural land base rate is lower than the actual land base rate, landowners save money by designating their land as agricultural.<sup>189</sup> Although this economic incentive does encourage landowners to preserve the agricultural nature of their land, the economic incentives for selling their land or using it for other purposes may still be too tempting.<sup>190</sup> As cities push into agricultural areas, the demand for land

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*Id.*

<sup>182</sup> IND. CODE § 32-30-6-9(d)(1) (2006). The change in language is significant because it may prevent ethanol and biodiesel plants from being built on agricultural land.

<sup>183</sup> IND. CODE § 32-30-6-9(d) (2006).

<sup>184</sup> IND. CODE § 32-30-6-9(b) (2006).

<sup>185</sup> See *supra* notes 80-84 and accompanying text (explaining the purpose and history of Indiana’s right-to-farm law).

<sup>186</sup> See *supra* notes 80-84 (farmers on urban fringe are more likely to sell their land).

<sup>187</sup> See *supra* notes 90-91 (stating Indiana’s Uniform Conservation Easement Act and differential assessment statute).

<sup>188</sup> IND. CODE § 6-1.1-4-4.5(b)(1) (2006). The statute substitutes the statewide agricultural land base rate value of one thousand fifty dollars (\$1,050) per acre for eight hundred eighty dollars (\$880) per acre. *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *supra* note 30 (stating why farmers on the urban fringe are more likely to sell their land).

increases, driving prices of land higher.<sup>191</sup> A property tax break may not be enough incentive to outweigh a large sale price.<sup>192</sup> Often, prime farmland has been converted for wasteful purposes.<sup>193</sup> Additionally, this endangered land is essential for food and dairy production.<sup>194</sup>

The other statewide policies that attempt to preserve land are Indiana's version of the FPPA and the Uniform Conservation Easement Act.<sup>195</sup> Unlike the federal FPPA, Indiana does not use permissive language throughout and prohibits state agencies from funding projects in certain areas.<sup>196</sup> However, the department of local government finance gives priority to school construction projects that do not contribute to conversion of farmlands.<sup>197</sup> Indiana provides a stronger protection against funding the conversion of farmland, but the protection is not absolute.<sup>198</sup> In combination, the FPPA and Indiana's statewide version of the FPPA can play a role in at least limiting federal and state governments from converting agricultural land for their own uses.<sup>199</sup>

The Uniform Conservation Easement Act, unlike the other attempts by the state to preserve farmland, is the only measure which creates a permanent protection for the land itself.<sup>200</sup> In conjunction with the FRPP, the Uniform Conservation Easement Act recognizes the validity and

<sup>191</sup> See *supra* note 30 (stating why farmers on the urban fringe are more likely to sell their land).

<sup>192</sup> See *supra* notes 30, 91 (stating Indiana's differential assessment and also the reasons farmers on the urban fringe sell their land).

<sup>193</sup> American Farmland Trust: Resources: Farming on the Edge Report, [www.farmland.org](http://www.farmland.org) (last visited Jan 12, 2006). The rate of conversion of prime land was 30 percent faster proportionally than the rate for non-prime rural land from 1992-1997, resulting in marginal land requiring more resources like water being put into production. *Id.* The prime farmland is being wasted because, from 1982-1997, U.S. population grew by 17 percent but urbanized land grew by 47 percent. *Id.* Over the past 20 years, the acreage per person for new housing almost doubled; since 1994, housing lots larger than ten acres have accounted for 55 percent of the land developed. *Id.*

<sup>194</sup> American Farmland Trust: Resources: Farming on the Edge Report, [www.farmland.org](http://www.farmland.org) (last visited Jan 12, 2006). 86% of U.S. fruits and vegetables, 63% of dairy products, 39% of meat, and 35% of grain are produced in urban-influenced areas. *Id.*

<sup>195</sup> IND. CODE § 32-23-5-2 (2006) (defining Indiana's Uniform Conservation Easement Act).

<sup>196</sup> See *supra* note 88 (explaining S. 392).

<sup>197</sup> See *supra* note 88 (explaining S. 392).

<sup>198</sup> See *supra* note 88 (explaining S. 392).

<sup>199</sup> See *supra* note 88 (explaining S. 392); notes 59-60 and accompanying text (explaining the funding deficiencies of the FRPP).

<sup>200</sup> See *supra* note 90 (stating that once land is protected by an easement, it remains under protection).

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purpose of conservation easements.<sup>201</sup> Despite the importance of this act in the preservation of agricultural land, the effectiveness of this program is once again limited to the land that is under the protection of a conservation easement.<sup>202</sup> Since conservation easement programs require funding, and funding is always limited, these programs can only have limited success at best.<sup>203</sup> While Indiana has taken steps to protect its shrinking amount of farmland, more emphasis must be placed on a permanent protection of the land itself.<sup>204</sup> The continuing growth of energy-producing crops on Indiana's farmland is necessary for the state to become a biofuels leader.<sup>205</sup> While the federal government and Indiana government have not adequately protected farmland, other states' preservation plans are not fully effective either.<sup>206</sup>

## 2. Applying Other Methods in Indiana

In a limited sense, the federal government has laid the foundation for the preservation of farmland.<sup>207</sup> However, states themselves have to take further action to ensure that their unique issues concerning the protection of cropland are addressed.<sup>208</sup> Nearly all States in the United States have taken action to pass right-to-farm laws, differential assessment for taxes, and conservation easement acts.<sup>209</sup> Some states, acting more creatively, have protected their unique natural resources or given priority to a unique public preference.<sup>210</sup> Protecting agricultural land in Indiana is not about protecting a unique resource or a unique

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<sup>201</sup> See *supra* note 90. Indiana's Uniform Conservation Easement Act serves the same purpose at the state level that the FRPP does on a federal level. IND. CODE § 32-23-5-2 (2006).

<sup>202</sup> See *supra* notes 59-60 (explaining how requests for easements are not always filled because of lack of funding).

<sup>203</sup> See *supra* notes 59-60 (explaining how requests for easements are not always filled because of lack of funding).

<sup>204</sup> See *supra* notes 59-60 (explaining how requests for easements are not always filled because of lack of funding).

<sup>205</sup> See *supra* Part II.C (tying together Indiana's crop production to the state becoming a biofuel's leader).

<sup>206</sup> See *supra* Part III.B.2 (evaluating how other states have protected their farmland and how those procedures could be applied in Indiana).

<sup>207</sup> See *supra* Part III.A (surveying the history of the federal government's preservation plans for agricultural land).

<sup>208</sup> See *supra* notes 63-79 and accompanying text (discussing how other states have implemented preservation plans for agricultural land).

<sup>209</sup> See *supra* notes 63-79 and accompanying text (explaining how all states have passed a right-to-farm law).

<sup>210</sup> See *supra* notes 70-72 and accompanying text.

public preference, but is about protecting the limited amount of the state's farmland.<sup>211</sup>

Consequently, the Corn Belt states have similar goals in protecting their farmland for purposes of growing similar crops.<sup>212</sup> These goals manifest themselves in agricultural district enabling legislation in Illinois, Ohio, and Iowa.<sup>213</sup> Agricultural districts protect farmland itself, rather than the practices of farming, but do not provide the same level of protection as agricultural zoning.<sup>214</sup> First, landowners have the discretion to form an agricultural district.<sup>215</sup> Agricultural landowners may not be interested in placing their land within an agricultural district for fear that it will make their land decrease in value.<sup>216</sup> Agricultural zoning would take the choice of protecting the farmland out of the hands of the landowners and place it with the state government.<sup>217</sup> Second, once the owner has placed the land into an agricultural district, it only remains within the district for a definite period of time.<sup>218</sup> Land located within an agricultural zone remains protected until the approval of a change or variance.<sup>219</sup> Finally, agricultural districts may place further

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<sup>211</sup> See *supra* note 89 (stating Indiana's public preference is protecting food security).

<sup>212</sup> See *supra* notes 74-79 and accompanying text (describing the conservation plans for the other Corn Belt states).

<sup>213</sup> See *supra* notes 74-79 and accompanying text (referencing the Corn Belt statutes for agricultural districts). Thirteen other states also have agricultural district enabling legislation. American Farmland Trust: Resources, [www.farmland.org](http://www.farmland.org) (last visited Jan. 12, 2007).

<sup>214</sup> See *supra* note 141 and accompanying text (explaining the benefits of agricultural zoning).

<sup>215</sup> OHIO REV. CODE ANN. § 929.02(A) (West 2007). The language of Ohio's statute demonstrates who may create an agricultural district and the discretion in its creation:

Any person who owns agricultural land may file an application with the county auditor to place the land in an agricultural district for five years if, during the three calendar years prior to the year in which that person files the application, the land has been devoted exclusively to agricultural production or devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government . . . .

*Id.*

<sup>216</sup> See *supra* note 30 (analyzing how high sale prices tempt farmers to sell their land to those who will use it for non-agricultural purposes).

<sup>217</sup> See *supra* notes 165-67 (discussing how permissive language that does not mandate action reduces effectiveness in protecting agricultural land, such as under the FPPA).

<sup>218</sup> OHIO REV. CODE ANN. § 929.02(A) (West 2007). In Ohio, the land only remains within the agricultural district for five years. *Id.*

<sup>219</sup> See *supra* note 141 and accompanying text (stating the benefits of agricultural zoning).

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restrictions on what can become an agricultural district.<sup>220</sup> Although agricultural districts take a step in the right direction in protecting farmland, their creation does not provide enough certainty to protect farmland producing biofuels.<sup>221</sup>

C. *How Can We Make Biofuel a Viable Source of Energy?*

Developing new technology is an expensive venture.<sup>222</sup> Subsidization currently spurs the development of the biofuels industry through use of tax credits.<sup>223</sup> The federal government decreases the cost of production through tax credits and the mandate that the fuel industry use a certain amount of renewable fuels which also create a demand for the product.<sup>224</sup> Biofuel would be too costly to be considered a viable alternative to petroleum products without the aid of the federal government.<sup>225</sup> With the government's assistance, biofuel can compete with gasoline.<sup>226</sup> However, no guarantee exists that Congress will continue to support the biofuels industry.<sup>227</sup>

Indiana possesses the opportunity to play a major part in this burgeoning field of biofuels if it encourages biofuel growth and development within the state.<sup>228</sup> First, Indiana should encourage biofuel development because of its location.<sup>229</sup> Centrally located and with rail and highway access to the surrounding Midwestern states, Indiana sits

<sup>220</sup> OHIO REV. CODE ANN. § 931.02(B) (West 2007). Statutes include restrictions as to the average yearly income and size. To become an agricultural security area in Ohio, the area must be larger than five hundred acres. *Id.*

<sup>221</sup> See *supra* note 141 and accompanying text (stating the benefits of agricultural zoning).

<sup>222</sup> See *supra* notes 117-23 and accompanying text (the development of ethanol and biodiesel were heavily subsidized by the federal government. Indiana also subsidizes biofuel production).

<sup>223</sup> Ethanol has a federal tax credit of 51 cents per gallon pursuant to the VEETC. Yacobucci, *supra* note 97, at summary. Indiana has a state tax credit of 12.5 cents per gallon. 2006 IND. TAX 31 (LexisNexis 2006).

<sup>224</sup> See *supra* note 120 and accompanying text (explaining the federal Renewable Fuels Standard).

<sup>225</sup> See *supra* notes 117-23 (stating the federal and Indiana legislation that subsidizes biofuels).

<sup>226</sup> Yacobucci, *supra* note 97. "It has been argued that the fuel ethanol industry could scarcely survive without these incentives." *Id.*

<sup>227</sup> *Biofuels: Policy and Business Organization Issues*, at 3. For example, in Minnesota, due to budget problems, the state reduced incentives from twenty cents per gallon to only thirteen cents per gallon and only for the first three million gallons. *Id.*

<sup>228</sup> See *supra* notes 121-36 and accompanying text (explaining Indiana's current place in the biofuel network and how it is in a position to take a more prominent place).

<sup>229</sup> See *supra* note 131 and accompanying text (regarding Indiana's central location, lessening transportation costs since ethanol cannot use petroleum lines).

in an ideal location as a producer and exporter of biofuel.<sup>230</sup> Access to railways, highways, and barges is essential for exporting biofuels since they cannot use the petroleum pipelines currently in place.<sup>231</sup> Second, Indiana is one of the leading producers of corn and soybeans in the nation, and it is less expensive to produce biofuel close to the supply.<sup>232</sup> Lowering the price of production would in turn lower the price for the consumer, even without a government subsidy.<sup>233</sup> Finally, by maintaining and increasing the supply of corn and soybeans, production can also increase.<sup>234</sup> In order for the crop supply to remain consistent, the land on which the crops are grown must be preserved through a plan that protects agricultural land itself.<sup>235</sup>

*D. Creating an Agriculturally Protective Zoning Scheme in Indiana Benefits Biofuel*

Because of the inadequacy of current federal and Indiana legislation to permanently protect agricultural land, especially considering Indiana's possible key role in the development of biofuel as a viable energy alternative, Indiana must take the lead in establishing agricultural zoning.<sup>236</sup> In recognizing the insufficiency of current plans, many counties and cities in Indiana have taken it upon themselves to further protect farmland, but Indiana must mandate stronger protection of agricultural land.<sup>237</sup> In accordance with *Economic Growth from Hoosier*

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<sup>230</sup> *Plant Built in Claypool, Indiana*, <http://www.louisdreyfus.com/content.cfm?page=news.cfm&newsitem=1687&gbus=3> (last visited Nov. 11, 2007). Louis Dreyfuss announced the opening of a plant in Claypool:

The plant, located in northern Indiana, will be ideally situated to source soybeans locally and from neighboring states. Competitive truck and rail access to feed markets in Indiana and the Southeast will provide a consistent outlet for soybean meal. Further, Claypool sits in the center of burgeoning biodiesel demand in Indiana and surrounding midwestern states.

*Id.*

<sup>231</sup> Yacobucci, *supra* note 97, at 3.

<sup>232</sup> *Id.* Corn and soybeans must be shipped to a processing plant for production. *Id.* Growing the raw materials for the fuel closer to their production center also lowers cost. *Id.*

<sup>233</sup> See *supra* note 131 and accompanying text (regarding the peculiarities of producing and shipping ethanol).

<sup>234</sup> See *supra* notes 133-36 and accompanying text (explaining how encouraging biofuels will financially benefit farmers).

<sup>235</sup> See *supra* Part II.C.1 (stating the importance of preservation of agricultural land to promote biofuels).

<sup>236</sup> See *supra* Part III.B.1 (analyzing Indiana's current preservation plan and its weaknesses).

<sup>237</sup> See *supra* notes 93-95 and accompanying text (explaining county and state preservation plans in Indiana).



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*Homegrown Energy*, Indiana's farmland must be protected to promote homegrown energy.<sup>238</sup> Creating a zoning standard that protects agricultural land would strongly protect farmland because it runs with the land instead of the owner.<sup>239</sup> Also, unlike conservation easements or purchase of development rights, a zoning standard can stand without funding.<sup>240</sup> Additionally, unlike agricultural districts, agricultural zoning is government mandated instead of landowner initiated and lasts for an indefinite period of time.<sup>241</sup> Permanently protecting farmland would ensure Indiana a primary place in the American movement to biofuels.<sup>242</sup>

The benefits of an agricultural zoning standard would safeguard and promote the "public health, safety, . . . [and] general welfare" of the community.<sup>243</sup> The use of agricultural zoning can protect farmland from being converted to non-farmland, prevent the fragmentation of farms, prevent land-use conflicts, and protect farmers from non-agricultural intrusion into farm areas.<sup>244</sup> The aforementioned reasons are all legitimate government interests.<sup>245</sup> Further, protecting farmland from being converted to non-farmland is one of the benefits of agricultural zoning and also the primary goal in enacting an agricultural zoning standard.<sup>246</sup> An agricultural zoning standard promotes the health of the community because farmland provides the community with open space, wildlife habitats, and an aesthetically beautiful area.<sup>247</sup> By ensuring that non-agricultural areas do not intrude on farm areas, a standard would also promote the safety of the community.<sup>248</sup> Since a zoning standard in Indiana would promote the growth and use of biofuel throughout the whole country, it would benefit the general welfare beyond that of even the immediate community.<sup>249</sup>

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<sup>238</sup> See *supra* notes 124-29 and accompanying text (stating Indiana's Homegrown Energy plan).

<sup>239</sup> See *supra* note 141 (explaining the benefits of agricultural zoning).

<sup>240</sup> See *supra* note 164-74 (analyzing problems with conservation easement programs).

<sup>241</sup> See *supra* notes 212-20 (analyzing agricultural districts in other states).

<sup>242</sup> See *supra* Part II.C.1 (identifying Indiana's place in the biofuel network).

<sup>243</sup> *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926).

<sup>244</sup> See *supra* notes 137-51 and accompanying text (explaining the creation of a constitutional agricultural zoning standard).

<sup>245</sup> See *supra* notes 137-51 and accompanying text (explaining the creation of a constitutional agricultural zoning standard).

<sup>246</sup> See *supra* notes 137-51 and accompanying text (explaining the creation of a constitutional agricultural zoning standard).

<sup>247</sup> See *supra* note 66 (stating these qualities as rural amenities).

<sup>248</sup> See *supra* note 64 (explaining the purpose and popularity of right-to-farm laws).

<sup>249</sup> See *supra* note 105 (describing the widespread benefit of promoting biofuels).

By defining an area as agricultural, a zoning ordinance restricts the density of residential development by creating a minimum lot size.<sup>250</sup> The areas are designated for this zoning practice on the basis of soil quality and other factors relating to location.<sup>251</sup> The designation limits the activities for which the land can be used.<sup>252</sup> Agricultural zoning communities foster “smart growth” by directing growth to areas already urbanized or where growth is desired and discouraging growth on lands with key resources.<sup>253</sup>

Further, creating an agricultural zoning standard would not constitute an unconstitutional taking.<sup>254</sup> As previously established, the purpose of the agricultural zoning standard is to protect a legitimate state interest since it promotes the health, safety, and general welfare of the community.<sup>255</sup> By protecting farmland through a zoning standard, the state’s interest in promoting biofuel is substantially advanced.<sup>256</sup> Creating this zoning standard does not physically invade the property, but merely serves to protect the property from changing its current uses.<sup>257</sup>

Similar to *Lucas*, where a zoning standard was enacted to protect coastal lands, an agricultural zoning standard serves to only preserve the

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<sup>250</sup> Hudkins, *supra* note 138, at 2.

<sup>251</sup> American Farmland Trust, *Fact Sheet: Agricultural Protection Zoning* (Sept. 1998), <http://www.farmland.org> (last visited Oct. 24, 2007).

<sup>252</sup> Chudnov v. Bd. of Appeals of Town of Bloomfield, 154 A. 161, 163 (Conn. 1931). The court attempted to develop a test as to what practices were acceptable to farming and agricultural zoning:

Doubtless a man might be a dairyman, and not be a farmer, as if he were to build a barn, buy a herd of cows and buy from others the grain and other forage to feed them, and sell their milk or other produce; and if this was his principal business he would not be exempt from proceedings in bankruptcy because he was a farmer. But if, while farming, he established, as one of the departments of his industry, a dairy to utilize the products of his farm and convert them to profitable uses, he is none the less a farmer.

*Id.*

<sup>253</sup> Richardson, *supra* note 144, at 59. The author proposes that by changing land to agricultural zones, it is “downzoning” because it further restricts the property. *Id.* The most common legal challenges to “downzoning” are spot zoning, takings, substantive due process, equal protection, and 42 U.S.C. § 1983. *Id.* at 60.

<sup>254</sup> See *supra* notes 137-51 and accompanying text (explaining the creation of a constitutional agricultural zoning standard).

<sup>255</sup> Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926).

<sup>256</sup> See *supra* note 106 (discussing the benefits of using agricultural land for biofuel production).

<sup>257</sup> See *supra* notes 149-51 and accompanying text (discussing how agricultural zoning does not constitute a Fifth Amendment taking).

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status quo of the land.<sup>258</sup> However, unlike *Lucas*, there is no issue that the zoning constitutes a taking because there is no economically viable use of the land.<sup>259</sup> Since agricultural land will continue to be used as farmland to produce crops and a profit, the land might actually become more economically viable considering that the increased need for corn and soybeans will drive crop prices up, thereby creating a larger profit for farmers.<sup>260</sup> Agricultural zoning would protect Indiana farmers' economic interests and also promote community interests by promoting biofuels.<sup>261</sup>

IV. CONTRIBUTION: PROPOSED INDIANA LEGISLATION TO PROTECT FARMLAND

Although current federal and state legislation protects farming operations and farmers' economic status, Indiana farmland needs more protection. Sustaining biofuel production requires a constant supply of corn and soybeans grown on this farmland. Indiana's dedication to biofuel growth and production makes conserving farmland even more urgent. To further demonstrate the state's goals of preserving farmland and promoting biofuel production, the state should mandate agricultural zoning. By creating mandatory agricultural zoning the state rededicates itself to the purpose of protecting farmland, defines the protected land and limits for its use, and creates a heavy burden on those who would seek a variance or rezoning. First, Part IV.A proposes model language for an agricultural zoning standard intended in particular to suit Indiana.<sup>262</sup> Then, Part IV.B comments on the language and provisions chosen.<sup>263</sup>

A. *Proposed Indiana Statute: Agricultural Zoning Statute*

1. Purpose: The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural

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<sup>258</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The court in *Lucas* upheld an act that forbade development on coastal lands. *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> See *supra* notes 133-35 and accompanying text (predicting prices for Indiana crops will increase due to the increased demand).

<sup>261</sup> See *supra* Part III.D (explaining the how biofuel production promotes Indiana farmers' economic interests).

<sup>262</sup> See *infra* Part IV.A (proposing an addition to Indiana Code that would mandate agricultural zoning throughout the state).

<sup>263</sup> See *infra* Part IV.B (commenting on how the model language chosen is the right language for protecting Indiana's farmland).

land for the production of food and other agricultural products *and for such uses as the production of biofuels*. The general assembly finds that *for purposes of public health, safety, and general welfare, agricultural land is a valuable natural resource that needs protection.* ~~when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements.~~ It is the purpose of this section to reduce the loss to the state of its agricultural resources *by safeguarding agricultural land from conversion to other uses through mandatory agricultural zoning.* ~~limiting the circumstances under which agricultural operations may be deemed to be a nuisance.~~<sup>264</sup>

2. Agriculturally Zoned Land: Any land located within the state of Indiana, which is:<sup>265</sup>

(a) Zoned agriculturally under a zoning ordinance for the county in which it is situated; or

(b) Currently in use to grow crops, has been used to grow crops in the past but is currently in fallow, or being used for an agricultural operation, including but not limited to production of ethanol or biodiesel (or any other biofuel that may be developed in the future pertaining to the use of crops); Shall now be zoned agricultural land for purposes of this section and shall remain zoned agricultural land indefinitely, except if rezoned under (4).

3. Restrictions on Agricultural Land: Land zoned agricultural is subject to the following restrictions:

(a) Land may not be used for commercial, residential, or industrial uses.

(b) Agricultural zoning does not restrict use for single-family residences, storing, packing or processing plants from being built.

(c) Land may not be subdivided into lots unsuitable in size for farming purposes;<sup>266</sup>

<sup>264</sup> The proposed amendment is italicized and is the contribution of the author. IND. CODE § 32-30-6-9(B) is the current language of Indiana's right-to-farm law.

<sup>265</sup> The remainder of the proposed statute is based upon the foregoing background and analysis.

(d) Change in ownership does not lift the restrictions of the zoning ordinance;

4. Rezoning: If a variance or rezoning is sought, the burden is on the person requesting the change to demonstrate that it is in the best interests of the public for the request to be granted. The request shall be brought before a county board, committee or commissioner and the following considerations must be taken into account:

(a) The viability of the land as farmland, as determined by factors such as soil, climate, topography, markets for the product, extent and nature of farm improvements, the current status of farming, and anticipated trends in agricultural economic conditions and technology.<sup>267</sup>

(b) The availability of non-agriculturally zoned land within the same area that could also be used for the purpose.

(c) The use of the adjacent land and whether changing the zoning would make the use consistent with that of the adjacent land.

(d) Whether the land is currently being used to grow raw materials used in the production of biofuels.

(e) Any other matter than may be relevant.

#### B. *Commentary*

As stated in Indiana's right-to-farm law, protecting and conserving farmland is state policy. The agricultural zoning standard reiterates the state policy of preserving farmland, but states a different reasoning and method of protecting farmland. In addition to encouraging and developing land for food purposes, the statute states, as one of the goals of protection, the production of biofuels. Also, because zoning ordinances are upheld if created to safeguard and promote the "public health, safety, . . . [and] general welfare of the community[.]"<sup>268</sup> similar language was inserted to hinder Constitutional challenges.

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<sup>266</sup> Zoning ordinances restrict how small the lots can be, varying from a two acre to a forty acre minimum. American Farmland Trust, [www.Farmland.org](http://www.Farmland.org) (last visited Jan. 12, 2007).

<sup>267</sup> This language is adopted from Illinois' Agricultural District Statutes. 505 ILL. COMP. STAT. 5/8(b) (2005).

<sup>268</sup> *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926).

Once the purpose of the statute is set out, then the agricultural land to be protected must be designated. Previously, no statewide agricultural zoning ordinance existed, but some counties had initiated county-based zoning. Since counties may have already designated farmland as zoned for agriculture, the statute first gives credit to the counties for their agricultural designation. Second, the statute places all land that is in practice used as agricultural land within an agricultural zone to protect it from changing uses. Since producing biofuels as near to the source of raw material as possible reduces the costs of production, ethanol and biodiesel plants are specifically named and included within agricultural zoning. Also, unlike agricultural districts, agricultural zoning remains within the same zoning designation until someone challenges the zoning.

The purpose of creating the agricultural zoning is to protect farmland from being converted into land for other uses. The restrictions placed upon the zoned land are intended to prevent the landowners from using the land for purposes other than farmland. Alternatively, if the owner does not want to use the land as farmland, the restrictions serve to maintain the possibility for the land to be used as farmland in the future. However, the restrictions are not meant to make family farms or farming operations located on farms illegal. The last restriction reiterates that agricultural zoning runs with the land, not the landowner.

Because of the importance of preserving the land once it has been zoned agricultural, the person wishing to change the zoning has a heavy burden to prove the land should be used for other purposes. The person would have to present reasoning before a county body that makes land use decisions. Besides what the person presents, the board must also take factors into account that ensure the protection of farmland. The factors take into consideration policies used by other farmland protection legislation, such as the quality of the soil. By looking at the use of the adjacent land, the board can avoid illegal spot zoning. Given that the motivation for this legislation is promoting biofuels, whether the land is used to produce the raw materials for biofuels is a factor. Finally, all statutes need a catch-all phrase so that the board has the ability to take into account a factor that was not considered by the drafter of the statute.

#### V. CONCLUSION

Federal, state, and county governments have recognized the loss of farmland as a problem for the last thirty years. Previously, farmland protection was important for orderly development of communities,

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national food security, improving the local economy, environmental services, and protection of the public preference for rural character, wildlife habitat, and aesthetics. While these are still important reasons to protect farmland, farmland protection is even more important when viewed as a limited natural resource that grows crops for biofuel production.

The heightened urgency for farmland protection further changes the nature of the protection. Previous safeguards encouraged conservation of land, but did not mandate it. Easement programs only protect as much land as they can with their limited funding. As the population increases and pushes into rural areas, stronger protection is needed to prevent farmland from being used in other ways. Although no other state has mandated agricultural zoning, in light of the present circumstances, Indiana should take the lead and be the first.

As Indiana pushes to become a leader in biofuel production, it should also demonstrate that like its energy predecessor, petroleum, farmland is an important natural resource which requires protection. By regulating the conservation of farmland through mandatory agricultural zoning, Indiana would commit itself to agriculture, alternative fuel production, and the conservation of America's oldest natural resource. As a leader in biofuel production, Indiana could change its motto from "The Crossroads of America" to "Fueling the Crossroads of America."

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